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2496  
No. 11729

IN THE  
United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

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WESTERN AIR LINES, INC.,

Appellant,

vs.

LABOR COMMISSIONER OF THE DIVISION OF  
LABOR LAW ENFORCEMENT, DEPART-  
MENT OF INDUSTRIAL RELATIONS OF  
THE STATE OF CALIFORNIA,

Appellee.

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**TRANSCRIPT OF RECORD**

Upon Appeal from the District Court of the United States  
for the Southern District of California,  
Central Division

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**FILED**

NOV 14 1947

PAUL P. O'BRIEN,  
CLERK





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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:

GUTHRIE, DARLING & SHATTUCK

737 Pacific Mutual Building

Los Angeles 14, Calif.

For Appellee:

PAULINE NIGHTINGALE

EDWARD M. BELASCO

503 California State Building

217 West First Street

Los Angeles 12, Calif. [1\*]

BEFORE THE  
NATIONAL MEDIATION BOARD

In the Matter of:

WESTERN AIR LINES, INC., —  
INLAND AIR LINES, INC.,

and

AIR LINE MECHANICS DEPARTMENT,  
UNITED AUTOMOBILE WORKERS OF  
AMERICA, C.I.O.

## AWARD

Acme Reporting Company  
1748 Pennsylvania Ave., N. W.  
Washington 6, D. C.  
Phone: District 0622

[2]

BOARD OF ARBITRATION  
APPOINTED UNDER RAILWAY LABOR ACT  
TO ARBITRATE DIFFERENCES

BETWEEN

WESTERN AIR LINES, INC., —  
INLAND AIR LINES, INC.,

and

AIR LINE MECHANICS DEPARTMENT,  
UNITED AUTOMOBILE WORKERS OF  
AMERICA, C.I.O.Case No. A-2289; Arb. 66  
No. 5598-O'C

Introduction:

On May 10, 1946, pursuant to the provisions of the Railway Labor Act, as amended, an arbitration agreement was entered into by and between the above-named parties. Copy of the agreement is set forth at large in the transcript of the record filed in the office of the Clerk of the District Court of the United States for the Southern District of California, and the original of which is filed in the office of the National Mediation Board under the above designated case number.

Pursuant to the agreement, Mr. Stanley W. Guthrie was designated arbitrator for the Western Air Lines, Inc., and the Inland Air Lines, Inc.; and Mr. Ross P. Althof was designated arbitrator for the employees represented by the Air Line Mechanics Department, United Automobile Workers of America, C. I. O. [3]

Subsequently, the air lines replaced Mr. Guthrie by Mr. Edward S. Shattuck, and the employees replaced Mr. Althof by Mr. William A. Gillespie. The arbitrators for the parties concerned, within the time required by law, selected Mr. Otto S. Beyer of Washington, D. C. as the third and neutral arbitrator of the Board.

Thereafter, on July 12th, the three arbitrators convened at Los Angeles, in the State of California, the place designated in the agreement for meeting, and organized themselves into a statutory Board of Arbitration, at which time Otto S. Beyer was designated as chairman.

The parties on that date and continuously on succeeding days, until and including the 23rd of July, appeared with their representatives and witnesses, and presented their evidence and arguments. At the conclusion of the presen-



tation of the evidence in the form of oral testimony and exhibits, the Board went into executive session, and after discussing and deliberating on the questions presented, made its award as contained hereunder.

#### Matters Submitted by Arbitration Agreement:

The matters submitted to the Board by the arbitration agreement related, 1, to wages; 2, to working conditions. [4]

#### Withdrawal of Issues:

The parties having agreed between themselves as to the rate of pay for crew chiefs, stipulated this fact to the Board. In addition, the parties agreed to withdraw from arbitration the dispute involving the rate of pay for plant protection men, and so stipulated to the Board.

#### Wages:

In the matter of the wage rates in dispute, the award of the Board is as follows:

Apprentice Mechanic:	1st 6 months	\$ .78 per hour
	2nd 6 months	.86 per hour
	3rd 6 months	.94 per hour
	4th 6 months	1.02 per hour
	5th 6 months	1.10 per hour
	6th 6 months	1.18 per hour
Mechanics:	1st 6 months	\$1.26 per hour
	2nd 6 months	1.34 per hour
	3rd 6 months	1.40 per hour
Senior Mechanics:	1st 6 months	\$1.44 per hour
	2nd 6 months	1.50 per hour
	3rd 6 months	1.56 per hour

Lead Mechanics:	1st 6 months	\$1.58 per hour
	2nd 6 months	1.64 per hour
	3rd 6 months	1.70 per hour
Inspectors:	1st 6 months	\$1.64 per hour
	2nd 6 months	1.70 per hour
	3rd 6 months	1.76 per hour
Crew Chiefs:	\$1.80 per hour by stipulation of parties.	
Stock Chaser:	1st 6 months	\$ .80 per hour
	2nd 6 months	.86 per hour
	3rd 6 months	.94 per hour
[5]		
Junior Stock Clerk:	1st 6 months	\$ .82 per hour
	2nd 6 months	.88 per hour
	3rd 6 months	.96 per hour
Stock Clerk:	1st 6 months	\$1.04 per hour
	2nd 6 months	1.10 per hour
	3rd 6 months	1.14 per hour
Stock Clerk in Charge:	1st 6 months	\$1.16 per hour
	2nd 6 months	1.20 per hour
	3rd 6 months	1.24 per hour
Senior Stock Clerk:	1st 6 months	\$1.26 per hour
	2nd 6 months	1.28 per hour
	3rd 6 months	1.32 per hour
Cargo Handlers:	1st 6 months	\$ .86 per hour
	2nd 6 months	.90 per hour
	3rd 6 months	.94 per hour
Assistant Cargo Clerk:	1st 6 months	\$ .98 per hour
	2nd 6 months	1.02 per hour
	3rd 6 months	1.06 per hour

Cargo Clerk:	1st 6 months	\$1.10 per hour
	2nd 6 months	1.16 per hour
	3rd 6 months	1.20 per hour
Passenger Service Supply Clerk:	1st 6 months	\$ .90 per hour
	2nd 6 months	.93 per hour
	3rd 6 months	.96 per hour
Senior Passenger Service Supply Clerk:	1st 6 months	\$1.00 per hour
	2nd 6 months	1.03 per hour
	3rd 6 months	1.06 per hour
Cleaner:	1st 6 months	\$ .86 per hour
	2nd 6 months	.90 per hour
	3rd 6 months	.94 per hour
Chief Cleaner:	1st 6 months	\$ .96 per hour
	2nd 6 months	1.00 per hour
	3rd 6 months	1.04 per hour
[6]		
Janitor:	1st 6 months	\$ .86 per hour
	2nd 6 months	.90 per hour
	3rd 6 months	.94 per hour
Utility Man:	1st 6 months	\$1.10 per hour
	2nd 6 months	1.14 per hour
	3rd 6 months	1.18 per hour
Fleet Serviceman:	1st 6 months	\$ .88 per hour
	2nd 6 months	.91 per hour
	3rd 6 months	.94 per hour
Plant Protection Man:	Withdrawn from arbitration by stipulation.	

In addition to the rates of pay as set forth above, employees required to work on the second or afternoon shift shall be paid an additional \$.04 per hour, and employees required to work on the third or night shift shall be paid an additional \$.06 per hour.

For purposes of determining the shifts on which employees have worked or may work, the following will apply:

1. Every shift which has heretofore or is hereafter started between 6:01 a. m. and 12:00 noon shall be considered as the first or day shift and all employees under this agreement who have heretofore commenced or who hereafter commence work on any such shift shall be paid both straight time and overtime at the first or day shift rate regardless of what hours were or are worked.

2. Every shift which was heretofore or is hereafter started between 12:01 p. m. and 6:00 p. m. shall be considered [7] as the second or evening shift, and all employees under this agreement who have heretofore commenced or who hereafter commence work on any such shift shall be paid both straight time and overtime at the second or evening shift rate regardless of what hours were or are worked.

3. Every shift which was heretofore or is hereafter started between 6:01 p. m. and 6:00 a. m. shall be considered as the third or night shift, and all employees under this agreement who have heretofore commenced or who hereafter commence work on any such shift shall be paid



both straight time and overtime at the third or night shift rate regardless of what hours were or are worked.

Working Conditions:

In the matter of the working conditions in dispute, the award of the Board is as follows:

1. Time worked in excess of 40 hours straight time in any one work week of seven consecutive days shall be considered overtime and shall be paid for at time and one-half, provided that time worked on the seventh day in any work week shall be paid for at double time if six consecutive days of eight hours straight time have been previously worked during that work week; and provided further that time not worked for the reasons listed below shall be considered as hours worked for the purpose of [8] this section:

(a) Sick leave with pay.

(b) Pre-arranged time off chargeable to sick leave credit.

(c) Death in the immediate family.

(d) Summoned by governmental agency on company business.

2. Time in excess of eight hours per day exclusive of meal periods for monthly-paid employees at stations other than Burbank, California, Salt Lake City, Utah, and Cheyenne, Wyoming, shall be considered overtime and shall be paid for at the rate of time and one-half in accordance with the provisions of this section.

3. (a) The following days are designated as holidays:

New Year's Day  
Memorial Day  
Independence Day  
Labor Day  
Thanksgiving Day  
Christmas Day  
Washington's Birthday

(b) All employees hereunder shall be given the above holidays off with straight-time pay but if required to work on said holidays, the employee or employees shall be paid at the rate of double time.

(c) An employee required to work on said holidays and who fails to report for work shall not be paid any compensation for that day. [9]

(d) If any of the above holidays fall on the employee's regular scheduled days off, the following regular work day shall be observed as the holiday.

4. (a) Each employee hereunder, other than temporary or part-time employees, shall annually receive two weeks' vacation for each full year of service during the Company's vacation year from July 1 of any year to June 30 of the succeeding year. Pay for such two weeks' vacation shall be at the rate of pay which the employee would have normally received for working the regular time during the vacation period.

(b) New employees, other than temporary or part-time employees, with less than one year of continuous service

on July 1, each year will accrue such vacation leave to July 1 and will be entitled to take such leave when they have been in the continuous service of the company six months, computed as follows:

11 months of service .....	9 working days
10    "    "    "    .....	8    "    "
9    "    "    "    .....	7    "    "
8    "    "    "    .....	6    "    "
7    "    "    "    .....	5    "    "
6    "    "    "    .....	5    "    "

Thereafter, on July 1 each year, they shall be entitled to two weeks' vacation with pay as provided in Paragraph (e).

(c) In computing the above vacation leave, regularly scheduled days off or holidays recognized under the terms of [10] this agreement occurring during the vacation leave period shall not be counted. Vacation leave will be taken on consecutive days and at such time as the employees' services can be spared during the period from July 1 to June 30 following the earned vacation period, unless special circumstances in individual cases warrant exceptions. Such cases shall receive the prior approval of the Personnel Manager. Vacation leave arrangements for personnel must be approved by the appropriate Supervisor at each location and by the Section Superintendent, and, except as otherwise specifically authorized, by an official of the Company, vacation leave is not cumulative and if not taken between July 1 and June 30 following the earned vacation period, the leave will be forfeited. In

the event of termination of employment with the Company for any reason whatsoever, employees who have been in the Company service for one year or more will be entitled to pay pro rata for vacation leaves which are accrued as of the date of termination.

5. An employee elected or appointed to conduct union business in the interest of air transport employees shall be considered good and sufficient reason for granting a leave of absence, provided that at any one time not to exceed four such employees shall be on leave of absence under the provisions of this section, and provided further that the foregoing restriction as to number on leave shall not be applicable to elected [11] delegates to the convention of the International Union.

Upon the written request, either from the Regional Director or the President of the International Union, U. A. W.-C. I. O., such employee shall be given a leave of absence for a period not to exceed one year. During such leave of absence seniority shall accumulate.

6. If a dispute arises between the Company and the employees covered by this Agreement, the Company will not change the conditions or rates of pay established by written agreement in effect between the Company and the employees hereunder, and the Union will not encourage or sanction employees stopping work or leaving the service, pending the determination or adjustment of the dispute in accordance with the procedures established by this agreement or by law.



The Company will instruct its supervisory employees as to the terms and conditions of this agreement and will discipline any employee who wilfully violates the terms hereof or advocates a policy contrary to that set out herein.

Inflation:

This Board specifically finds and certifies that the award herein rendered is consistent with the standards now in effect established by or pursuant to law for the purpose [12] of controlling inflationary tendency.

Certification:

We, the arbitrators in the proceedings to which this certificate is attached, hereby certify that this is a true and correct copy of the Award of the Board of Arbitration in said proceedings, as the same will be found in the file in the office of the Clerk of the District Court of the United States, Southern District of California.

OTTO S. BEYER

Chairman

WILLIAM A. GILLESPIE

Member

EDWARD S. SHATTUCK

Member

[Verified.]

[Endorsed]: Filed Jul. 26, 1946. [13]

In the District Court of the United States, in and for the  
Southern District of California  
Central Division

No. 5598 O'C. Civil

In the Matter of  
WESTERN AIR LINES, INC., ET AL.

JUDGMENT CONFIRMING AWARD

There having been filed in the clerk's office of this court at Los Angeles, on July 26th, 1946, a certified copy of an arbitration award, and no petition having been filed to impeach the said award within ten days thereafter, under Sec. 159, 2nd, of Title 45 of U. S. C., and this court having, under date of November 1st, 1946, entered a minute order confirming the award with instructions to the party interested to prepare a judgment confirming the award, and no judgment having been prepared by the interested party,

It Is Now By the Court Ordered that the said award be, and the same is hereby, confirmed.

Dated: Los Angeles, Calif., November 21st, 1946.

J. F. T. O'CONNOR

Judge

Judgment entered Nov. 21, 1946. Docketed Nov. 21, 1946. Book C. O. B., page 579. Edmund L. Smith, Clerk; by Francis E. Cross, Deputy.

[Endorsed]: Filed Nov. 21, 1946. [14]

[Title of District Court and Cause]

## PETITION FOR ORDER TO SHOW CAUSE

Comes now your petitioner, the Division of Labor Law Enforcement, and shows:

### I.

That it is a duly authorized, qualified and acting division of the Department of Industrial Relations of the State of California created by Chapter 1, of Division 1 of the Labor Code of the State of California, and as such is authorized to prosecute this proceeding.

### II.

That prior to the filing of this petition a written agreement to arbitrate certain issues of dispute dated May 10, 1946, was filed in the above-entitled matter pursuant to the provisions of the National Railway Labor Act; that a copy of said agreement is attached hereto, marked "Exhibit A", and made a part hereof by reference; and that said agreement to arbitrate was entered into on behalf of and for the benefit of the employees of the Western Airlines, Inc. hereinafter named. [15]

### III.

That the said agreement to arbitrate provides in section "eleventh" thereof that the award of the Board of Arbitration as to wage rates shall become effective January 1, 1946, and remain in effect for sixty (60) days from the date of the award, which date was July 26, 1946.

## IV.

That on July 26, 1946, the Board of Arbitration duly appointed under the provisions of the Railway Labor Act, and in pursuance thereof, duly rendered and filed its Award in the above-entitled matter; and that on November 21, 1946, no petition being filed to impeach the said Award within ten days thereafter, the said Award became final under the provisions of the Railway Labor Act, and Judgment Confirming Award was duly ordered by the above-entitled Court and entered on page 579 of Civil Order Book 40, of the records of said Court.

## V.

That prior to the filing of this petition and subsequent to the entry of Judgment Confirming Award, certain former employees of the Western Air Lines, Incorporated, duly assigned their claims to your petitioner as provided by law for wages earned by each of them while in the employ of the said Western Air Lines, Incorporated, as follows:

<u>Name of Employee</u>	<u>Work Performed</u>	<u>Dates Worked</u>	<u>Amount of Retroactive Wages</u>
Gerald Z. Bondy	Aviation mechanic	1- 1-46 to 5-16-46	99.65
James J. Jardine	Aircraft mechanic	1- 7-46 to 6-21-46	129.76
Lamont W. King	Apprentice aircraft mechanic	1- 1-46 to 6- 2-47	<u>28.40</u>
Amount Carried Forward .....			\$229.41



<u>Name of Employee</u>	<u>Work Performed</u>	<u>Dates Worked</u>	<u>Amount of Retroactive Wages</u>
Amount Brought Forward .....			\$229.41
Lawrence R. Kyle	Aircraft & engine mechanic	1- 1-46 to 6- 4-46	106.08
John Edward Lewis	Aircraft mech.	1- 7-46 to 6-23-46	137.90
Walter J. McLaughlin	Aircraft and engine mechanic	1- 1-46 to 5-17-46	57.65
Joseph Thos. McMahon	Aircraft mechanic	4-15-46 to 5-31-46	31.17

## VI.

That the amounts of retroactive wages stated in paragraph V hereof constitute the difference between the wage rates paid the said employees and the wage rates provided in the Award on file in the above-entitled matter.

## VII.

That the Western Air Lines, Inc. admits that the employees named in paragraph V hereof were employed by it for the period set forth therein, rendered services and performed work for the said period as therein stated, and it further admits that the amounts of retroactive wages as stated in the said paragraph V are correct, that the same are unpaid, and that all of the aforesaid matters come within the provisions of the Award on file in the above-entitled action.

## VIII.

That the amount of retroactive wages set forth in paragraph V hereof are due, owing and unpaid, and that al-

though demand has been made therefor, the Western Air Lines, Inc. refuses and continues to refuse to pay the same upon the ground that the employment of each of the assignors of your petitioner named in paragraph V hereof terminated on the last dates specified in the column headed "Dates Worked", all of which dates were prior to the date of the Award, to wit: July 26, 1946, on file in the above entitled matter. [17]

### IX.

That the Western Air Lines, Inc. in refusing to pay the retroactive wages hereinabove set forth, unlawfully fails, neglects, and refuses to comply with the Award and the Judgment Confirming Award rendered in the above-entitled action.

Wherefore, petitioner prays that this Court issue an order to the Western Air Lines, Inc. to show cause why it should not comply with the Award and Judgment Confirming Award heretofore rendered and entered in the above-entitled matter.

Dated: June 6, 1947.

DIVISION OF LABOR LAW ENFORCEMENT,  
DEPARTMENT OF INDUSTRIAL RELATIONS,  
STATE OF CALIFORNIA,

Petitioner,

By PAULINE NIGHTINGALE &  
EDWARD M. BELASCO,

Attorneys for Petitioner,

By PAULINE NIGHTINGALE

[Verified.] [18]

## EXHIBIT A

This Agreement, made and entered into this 10th day of May, 1946, between Western Airlines, Inc., and Inland Air Lines, Inc., (hereinafter referred to as the party of the first part), represented by Paul E. Sullivan, Vice President and Secretary, Western Air Lines, Inc., and Secretary and Treasurer, Inland Air Lines, Inc., and employees in the service of the above-named carriers by air (hereinafter referred to as the party of the second part) represented by the Airline Mechanics Department—United Automobile Workers—CIO as follows: Mechanics (Western Air Lines, Inc., and Inland Air Lines, Inc.); employees of Western Air Lines, Inc., classified under the Cargo Clerks, Stock Clerks, and Fleet Service Men Agreement with Western Air Lines, Inc., and including Jr. Stock Clerks, Stock Chaser, Stock Clerk, Stock Clerk in Charge, Senior Stock Clerk, Fleet Service Men, Passenger Service Supply Clerk, Senior Passenger Service Supply Clerk, Cargo Handlers, Assistant Cargo Clerks, Cargo Clerks, Utility Men, Cleaner, Janitor, Chief Cleaner, and Plant Protection Men.

Witnesseth: The parties hereto mutually agree and stipulate as follows:

First: The above-named carriers by air are carriers subject to the Railway Labor Act, as amended; the above-named employees are employees of such carriers by air; and the above representatives are the duly accredited representatives of such carriers by air and employees respectively.

Second: The controversy between the parties hereto, as hereinafter specifically stated, is hereby submitted to

arbitration, and such arbitration is had under the provisions of the **Railway Labor Act**.

Third: The Board of Arbitration (hereinafter referred to as "the Board") shall consist of three (3) members.

Fourth: The specific questions to be submitted to the Board for decision are as follows: Shown in Appendix "A" and Appendix "B" and made a part hereof.

Fifth: In its award the Board shall confine itself strictly to decision as to the questions so specifically submitted to it. [19]

Sixth: The questions, or any part thereof, as submitted, may be withdrawn from arbitration on notice to that effect signed by the duly accredited representative of the parties hereto and served on the Board, or upon the Chairman of the Board, at any time prior to the making of the award.

Seventh: The signatures of a majority of the members of the Board affixed to its award shall be competent to constitute a valid and binding award.

The Board shall make a specific finding and certification that the award is consistent with the standards now in effect, established by or pursuant to law, for the purpose of controlling inflationary tendencies.

Eighth: The Board shall begin its hearings prior to the expiration of the period of fifteen (15) days from the date on which the last arbitrator necessary to complete the Board is appointed.

Ninth: The Board shall make and file its award prior to the expiration of the period of fifteen (15) days from the date on which the Board begins its hearings, but the



parties hereto may agree, at any time prior to the making of such award, upon the extension of such period (whether or not previously extended).

Tenth: The Board shall hold its hearings in the City of Los Angeles, State of California.

Eleventh: The award of the Board shall become effective as of January 1, 1946 and as to schedule "B", appended hereto, shall remain in effect for one (1) year and thereafter subject to thirty (30) days notice under provisions of Section 6, Title I, of the Railway Labor Act, as Amended. As to schedule "A", appended hereto, the award of the Board shall become effective January 1, 1946 and remain in effect for sixty (60) days from the date of such award and subject to change thereafter under provisions of Section 6, Title I, of the Railway Labor Act, as Amended.

Twelfth: The award of the Board and the evidence of the proceedings before the Board relating thereto, certified under the hands of at least a majority of the members of the Board, shall be filed in the Clerk's office [20] of the District Court of the United States for the Southern District of California, Central Division, Los Angeles, California.

Thirteenth: Such award and proceedings so filed shall constitute the full and complete record of the arbitration.

Fourteenth: Such award so filed shall be final and conclusive upon the parties hereto as to the facts determined by the award and as to the merits of the controversy decided.

Fifteenth: Any difference arising as to the meaning, or the application of the provisions, of such award shall

be referred for a ruling to the Board, or to a sub-committee of the Board agreed to by the parties hereto; and such ruling, when certified under the hands of at least a majority of the members of such Board, or, if a sub-committee is agreed upon, at least a majority of the members of the sub-committee, and when filed in the same District Court Clerk's office as the original award, shall be a part of and shall have the same force and effect as such original award.

Sixteenth: The respective parties to the award shall each faithfully execute the same.

Seventeenth: This agreement constitutes the entire agreement between the parties to submit the controversy to arbitration.

Signed on behalf of the party of the first part by Paul E. Sullivan, and on behalf of the party of the second part by William A. Gillespie, International Representative, this day and year as above written.

FOR THE CARRIERS:

By /s/ Paul E. Sullivan  
Paul E. Sullivan  
Vice President & Secretary,  
Western Air Lines, Inc.  
Secretary & Treasurer  
Inland Air Lines, Inc.

FOR THE EMPLOYEES:

By /s/ William A. Gillespie  
William A. Gillespie  
International Representative

Witness:

/s/ Wm. F. Mitchell, Jr.

Mediator

National Mediation Board. [21]

City of Los Angeles    )  
 County of Los Angeles ) ss  
 State of California    )

On the 10th day of May, 1946, before me personally appeared Paul E. Sullivan and William A. Gillespie, to me known to be the persons described in and who executed the foregoing agreement, and duly acknowledged the execution thereof.

Seal

/s/ Earnest H. Brown

Notary Public

Notary Public and for the County of Los Angeles  
 State of California

My Commission expires Dec. 5, 1948 [22]

## APPENDIX A—WAGES

UAW-CIO has submitted the following demands and proposals to the carriers all of which said demands and proposals have been rejected by the carriers and are now in controversy:

Apprentice Mechanics	1st 3 months	\$ .80 per hour
	2nd 3 months	.92 per hour
	2nd 6 months	1.00 per hour
	3rd 6 months	1.12 per hour
	4th 6 months	1.18 per hour
Mechanics	1st 3 months	\$1.32 per hour
	4th to 9th month	1.38 per hour
	9th to 12th month	1.46 per hour
Senior Mechanics	1st 3 months	\$1.46 per hour
	4th to 9th month	1.52 per hour
	9th to 12th month	1.58 per hour

Lead Mechanics	1st 3 months	\$1.58 per hour
	4th to 9th month	1.66 per hour
	9th to 12th month	1.72 per hour
Inspectors	1st 3 months	\$1.66 per hour
	4th to 9th month	1.72 per hour
	9th to 12th month	1.78 per hour
Crew Chiefs		\$1.80 per hour
Stock Chaser	1st to 4th month	\$ .86 per hour
	4th to 9th month	.92 per hour
	9th to 12th month	.98 per hour
Junior Stock Clerk	1st to 4th month	\$ .86 per hour
	4th to 9th month	.92 per hour
	9th to 12th month	.98 per hour
Stock Clerk	1st to 4th month	\$1.06 per hour
	4th to 9th month	1.12 per hour
	9th to 12th month	1.18 per hour
Stock Clerk in Charge	1st 6 months	\$1.18 per hour
	Thereafter	1.26 per hour
Senior Stock Clerk	1st 6 months	\$1.26 per hour
	Thereafter	1.32 per hour
Cargo Handlers	1st 6 months	\$ .94 per hour
	Thereafter	1.00 per hour
Asst. Cargo Clerk	1st to 4th month	\$1.00 per hour
	4th to 9th month	1.06 per hour
	9th to 12th month	1.12 per hour
[23]		
Cargo Clerks	1st to 4th month	\$1.12 per hour
	4th to 9th month	1.18 per hour
	9th to 12th month	1.24 per hour



Passenger Service	1st 6 months	\$ .90 per hour
Supply Clerk	Thereafter	.96 per hour
Senior Passenger	1st 6 months	\$1.02 per hour
Service Supply Clerk	Thereafter	1.08 per hour
Cleaner		\$ .94 per hour
Chief Cleaner		1.05 per hour
Janitor		\$ .94 per hour
Utility men	1st 6 months	\$1.18 per hour
	Thereafter	1.24 per hour
Fleet Servicemen	1st to 4th month	\$ .90 per hour
	4th to 9th month	.96 per hour
	9th to 12th month	1.02 per hour
Plant Protection Men	1st 6 months	\$ .94 per hour
	Thereafter	1.00 per hour

In addition to the rates set forth in Schedule "A" employees required to work on the afternoon shift shall be paid an additional six (6) cents per hour and employees required to work on the night shift shall be paid an additional eight (8) cents per hour. [24]

## APPENDIX B—WORKING CONDITIONS

UAW-CIO has submitted the following demands and proposals to the carriers all of which said demands and proposals have been rejected by the carriers and are now in controversy:

1. Any employee required to perform work on the sixth day shall be paid at the rate of time and one-half.

Any employee hereunder required to perform work on the seventh day shall be paid at the rate of double time.

2. Time in excess of eight (8) hours per day exclusive of meal periods for monthly paid employees at stations other than Burbank, California, Salt Lake City, Utah, and Cheyenne, Wyoming, shall be considered overtime and shall be paid for at the rate of time and one-half in accordance with the provisions of this section, or by mutual consent, may be given time off to compensate therefor at the overtime rate.

3. (a) The following days are designated as holidays:

New Year's Day  
Memorial Day  
Independence Day  
Labor Day  
Thanksgiving Day  
Christmas Day  
Washington's Birthday

(b) All employees hereunder shall be given the above holidays off with straight time pay but if required to work on said holidays the employee or employees shall be paid at the rate of double time.

(c) An employee required to work on said holidays and who fails to report for work shall not be paid any compensation for that day.

(d) If any of the above holidays fall on the employee's regular scheduled days off, the following regular work day shall be observed as the holiday.

[Endorsed]: Filed Jun. 9, 1947. [25]

[Title of District Court and Cause]

### ORDER TO SHOW CAUSE

Upon reading the verified Petition of the Division of Labor Law Enforcement of the State of California, filed herein on June 9th, 1947, and good cause appearing therefor

It Is Hereby Ordered that the Western Air Lines, Incorporated appear before me at 10 . M., o'clock on the 30th day of June, 1947, at Court Room 7, Federal Building, 312 North Spring Street, Los Angeles, California, and show cause why it should not comply with the Award and Judgment Confirming Award heretofore rendered and entered in the above-entitled matter.

It Is Further Ordered that a copy of the verified Petition of the Division of Labor Law Enforcement of the State of California and of this Order be served upon the Western Air Lines, Incorporated, at least 10 days before the date of appearance on this Order.

Dated: June 9, 1947.

J. F. T. O'CONNOR

Judge United States District Court

[Endorsed]: Filed Jun. 9, 1947. [26]

[Title of District Court and Cause]

STATEMENT OF REASONS IN OPPOSITION TO  
ORDER TO SHOW CAUSE

Comes now Western Air Lines, Inc., through its undersigned attorneys, and opposes the petition for Order to Show Cause filed herein by Department of Industrial Relations of the State of California as follows:

I.

The question and issue involved between the assignors of petitioner (and petitioner) and Western Air Lines, Inc., is whether ex-employees of Western Air Lines, Inc., that is, whether employees who terminated their employment prior to the date of the arbitration award, to wit, July 26, 1946, are entitled to the benefits of the arbitration award. This specific question was not submitted to the Board of Arbitration for decision. This conclusively appears by Paragraph Fourth of Exhibit A of the petition and the questions presented as shown by Appendix A and Appendix B attached to said petition. In accordance with the (Federal) Railway Labor Act, Section 9, Sub-paragraph Second, such award after filing in the clerk's office of the District Court "shall be conclusive on [27] the parties as to the merits and facts of the controversy submitted to arbitration." It follows, therefore, that there was only a judgment or a conclusive determination on the matters submitted to the Board of Arbitration and the question here presented was not one of the questions submitted to arbitration. Therefore, there has been no adjudication on the question here involved, and Western Air Lines, Inc., is entitled to have that question judicially determined. That question can-



not be adjudicated in such a summary manner as by an Order to Show Cause issued based on the arbitration award filed in this court.

## II.

In view of the allegations of Paragraph VIII of the petition, it appears that a difference has arisen as to the application of the provisions of the arbitration award. In accordance with the agreement to arbitrate (Exhibit A to the petition) Paragraph Fifteenth thereof, it is provided that in the event of any difference arising as to the application of the provisions of such award, "such award shall be referred for a ruling to the board (of arbitration) or to a subcommittee of the board agreed to by the parties to the agreement to arbitrate." The (Federal) Railway Labor Act, Section 8, Sub-paragraph M thereof, likewise provides for that procedure. It thus appears that the petitioner and petitioner's assignors have failed to follow the procedure outlined by the (Federal) Railway Labor Act. The question here presented should have been referred back for a ruling to the arbitration board or to a subcommittee thereof. By reason thereof, petitioner has followed the wrong course of procedure.

## III.

In any event, persons who were not employees of Western Air Lines, Inc., at the date the arbitration award was made, to wit, July 26, 1946, are not entitled to the retroactive wages. The obvious purpose of allowing employees retroactive wages [28] while an arbitration board is considering the question of wage increase is to keep the employees on the job and to avoid a strike. That is the moving consideration for such retroactive pay increase. Obviously, an employee who quits during that

period has eliminated the reason for retroactive pay. By reason thereof, such ex-employees are not entitled to the benefits of retroactive pay fixed by an arbitration award made after the employees have quit.

In re Goodyear Tire & Rubber Co., Vol. 2, Labor Arbitration Reports 367 @ 373.

Also reported in Vol. 5, Prentice-Hall Labor Service, Paragraph 67242, decided April 3, 1946.

#### IV.

It is observed that the moving party has failed to file a memorandum of points and authorities. Under such circumstances such failure may be deemed a waiver by the moving party of the motion.

Difani v. Riverside County Oil, 201 Cal. 210 @ 213.

Rule 3, Subdivision D, Local Rules, District Court of the United States.

In view of all the foregoing, it is respectfully urged that petitioner should be denied any relief under the Order to Show Cause, dated June 9, 1947, issued in this proceeding.

GUTHRIE, DARLING & SHATTUCK  
MILO V. OLSON

Attorneys for Western Air Lines, Inc. [29]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Jun. 27, 1947. [30]

United States District Court  
Southern District of California  
Central Division  
No. 5598-O'C Civil

In the Matter of  
WESTERN AIR LINES, INC., et al.

ORDER OF COMPLIANCE

There was filed in the Clerk's office of this Court, at Los Angeles, on July 26, 1946, a certified copy of an arbitration award, and no petition having been filed to impeach the said award within ten days thereafter, under Sec. 159, 2nd, of Title 45 of U. S. C.; and this Court having, under date of November 1, 1946, entered a Minute Order confirming the award with instructions to the party interested to prepare a judgment confirming the award, and no judgment having been prepared by the interested party, the Court ordered that the award be confirmed. This order of the Court was made on November 21, 1946.

Thereafter, on June 9, 1947, the Petition for Order to Show Cause was filed in the above-entitled Court, which was directed to the Western Air Lines, Inc. to show cause why it should not comply with the award and judgment confirming the award rendered and entered. The Order to Show Cause came on before the Court on the 30th day of June, 1947, Pauline Nightingale, Esq., appearing for petitioner, and Milo V. Olson, Esq., appearing for the defendant Western Ail Lines, Inc., and the Court having heard and considered the oral arguments, and the authorities submitted,

It Is Ordered that the defendant, Western Air Lines, Inc., is directed to comply with the award and judgment.

Dated: June 30, 1947.

J. F. T. O'CONNOR

Judge

Judgment entered Jun. 30, 1947. Docketed Jun. 30, 1947. C. O. Book 44, page 12. Edmund L. Smith, Clerk; by John A. Childress, Deputy.

[Endorsed:] Filed Jun. 30, 1947. [31]

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[Title of District Court and Cause]

MOTION FOR AMENDMENT OF ORDER OF  
COMPLIANCE

To the Western Air Lines, Inc., and its attorneys,  
Guthrie, Darling & Shattuck, and Milo V. Olson,  
Esqs.:

You and Each of You Will please Take Notice, that the Division of Labor Law Enforcement of the State of California will, on Monday, July 21, 1947, at the hour of 10:00 o'clock A. M., or as soon thereafter as counsel can be heard, move the above-entitled Court in Court-room Number 7, Federal Building, 312 North Spring Street, Los Angeles, California, for an Order amending

the Order of Compliance heretofore rendered in the above-entitled matter on June 30, 1947, and entered in C. O. Book 44, page 12 of the records of the abovenamed court, as follows:

There was filed in the Clerk's Office of this Court, at Los Angeles, on July 26, 1946, a certified copy of an arbitration award, and no petition having been filed to impeach the said award within ten days thereafter, under Sec. 159, 2nd, of Title 45 of U. S. C.; and this Court having, under date of November 1, 1946, [32] entered a Minute Order confirming the award with instructions to the party interested to prepare a judgment confirming the award, and no judgment having been prepared by the interested party, the Court ordered that the award be confirmed. This order of the Court was made on November 21, 1946.

Thereafter, on June 9, 1947, a verified Petition for Order to Show Cause was filed in the above-entitled Court, by the Division of Labor Law Enforcement of the State of California, which was directed to the Western Air Lines, Inc., to show cause why it should not comply with the award and judgment confirming the award rendered and entered. The Order to Show Cause came on for hearing before the Court on the 30th day of June, 1947, Pauline Nightingale, Esq., appearing for petitioner, and Milo V. Olson, Esq., appearing for the respondent, Western Air Lines, Inc., and the Court having heard and considered the oral arguments, and the authorities submitted,



It Is Ordered that the respondent, Western Air Lines, Inc., comply with the award and judgment by paying the sum of \$562.21 to the Division of Labor Law Enforcement of the State of California as the duly authorized Assignee of Gerald Z. Bondy, James J. Jardine, La Mont W. King, Lawrence R. Kyle, John Edward Lewis, Walter J. McLaughlin and Joseph Thomas McMahon, former employees of the said respondent, on their claims for retroactive wages earned during the period from January 1, 1946, to June 23, 1946, inclusive.

This Motion will be based upon the pleadings and records on file in the above-entitled action and upon the ground of a clerical mistake arising from an omission in the Order of Compliance heretofore rendered under the provisions of Rule 60, Subdivision A of the Rules of Civil Procedure for the District Courts of the United States. [33]

Dated: July 15, 1947.

PAULINE NIGHTINGALE and  
EDWARD M. BELASCO

Attorneys for Petitioner

By Pauline Nightingale

Received copy of the within Notice of Motion for Amendment of Order of Compliance. Dated July 15, 1947. Guthrie, Darling & Shattuck, Attorneys for Western Air Lines, Inc., Respondent; by Milo V. Olson.

[Endorsed:] Filed Jul. 16, 1947. [34]

In the District Court of the United States, in and for the  
Southern District of California  
Central Division

No. 5598 O'C. Civil

In the Matter of

WESTERN AIR LINES, INC., et al.

### AMENDED ORDER OF COMPLIANCE

There was filed in the Clerk's office of this Court, at Los Angeles, on July 26, 1946, a certified copy of an arbitration award, and no petition having been filed to impeach the said award within ten days thereafter, under Sec. 159, 2nd, of Title 45 of U. S. C.; and this Court having, under date of November 1, 1946, entered a Minute Order confirming the award with instructions to the party interested to prepare a judgment confirming the award, and no judgment having been prepared by the interested party, the Court Ordered that the award be confirmed. This order of the Court was made on November 21, 1946.

Thereafter, on June 9, 1947, a verified Petition for Order to Show Cause was filed in the above-entitled Court, by the Division of Labor Law Enforcement of the State of California, which was directed to the Western Air Lines, Inc. to show cause why it should not comply with the award and judgment confirming the award rendered and entered. The Order to Show Cause came on for [35] hearing before the Court on the 30th day of June, 1947, Pauline Nightingale, Esq., appearing for petitioner, and Milo V. Olson, Esq., appearing for the respondent, Western Air Lines, Inc., and the Court having heard and considered the oral arguments and the

authorities submitted, made and entered its Order on June 30, 1947 directing the respondent, Western Air Lines, Inc., to comply with the award and judgment,

It further appearing that on July 16, 1947, a Motion for Amendment of the said Order of Compliance was filed by Petitioner and that the said Motion duly came on for hearing on the 21st day of July, 1947, Pauline Nightingale, Esq., appearing for Petitioner, and Milo V. Olson, Esq., appearing for the respondent, Western Air Lines, Inc., and the Court having heard and considered the oral arguments and authorities submitted;

It Is Ordered that the Order of Compliance heretofore rendered on June 30, 1947, be, and the same is hereby amended to direct that the respondent, Western Air Lines, Inc., comply with the award and judgment heretofore rendered and It Is Ordered that Respondent pay the sum of Five Hundred Sixty-two and 21/100 Dollars (\$562.21) to the Division of Labor Law Enforcement of the State of California, as the duly authorized Assignee of Gerald Z. Bondy, James J. Jardine, La Mont W. King, Lawrence R. Kyle, John Edward Lewis, Walter J. McLaughline and Joseph Thomas McMahon, former employees of the said respondent, in payment of their claims for retroactive wages earned during the period from January 1, 1946, to June 23, 1946, inclusive.

J. F. T. O'CONNOR

Judge

Dated: July 23, 1947.

Judgment entered Jul. 24, 1947. Docketed Jul. 24, 1947. Book C. O. B. 44, page 344. Edmund L. Smith, Clerk: by Francis E. Cross, Deputy.

[Endorsed]:' Filed Jul. 24, 1947. [36]

[Title of District Court and Cause]

NOTICE OF ENTRY OF AMENDED ORDER  
OF COMPLIANCE

To the Respondent Western Air Lines, Inc., and to  
Messrs. Guthrie, Darling & Shattuck, and Milo V.  
Olson, its attorneys:

You, and Each of You, Will Please Take Notice that  
the Amended Order of Compliance was duly entered July  
24, 1947 on page 344 of Civil Order Book 44 of the  
records of the above entitled Court.

Dated: July 25, 1947.

PAULINE NIGHTINGALE &  
EDWARD M. BELASCO

Attorneys for Petitioner

By Pauline Nightingale [37]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Jul. 26, 1947. [38]

[Title of District Court and Cause]

NOTICE OF APPEAL

In Accordance With Rule 73

To the Above Entitled Court and to the Clerk Thereof, and to the United States Circuit Court of Appeals, Ninth Circuit, and to the Clerk Thereof, and to the Labor Commissioner of the Division of Labor Law Enforcement, Department of Industrial Relations of the State of California, and to Pauline Nightingale and Edward M. Belasco, Its Attorneys:

To You, and Each of You, Notice is hereby given that Western Air Lines, Inc., defendant in the Order to Show Cause proceedings instituted by the Petition filed by the Division of Labor Law Enforcement of the State of California, filed herein on June 9, 1947, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from the final order made in the above entitled proceedings, entitled "Amended Order of Compliance" entered in this action on July 24, 1947, in Civil Order Book 44, page 344, and from the whole thereof, said order having reference to aforementioned petition for Order to Show Cause.

GUTHRIE, DARLING & SHATTUCK  
MILO V. OLSON

Attorneys for Appellant Western Air Lines, Inc. [39]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Aug. 8, 1947. [40]



[Title of District Court and Cause]

### CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 43 inclusive contain full, true and correct copies of Award; Judgment Confirming Award; Petition for Order to Show Cause; Order to Show Cause; Statement of Reasons in Opposition to Order to Show Cause; Order of Compliance; Motion for Amendment of Order of Compliance; Amended Order of Compliance; Notice of Entry of Amended Order of Compliance; Notice of Appeal and Designation of Contents of Record on Appeal which constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$12.10 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 12 day of September, A. D. 1947.

(Seal)

EDMUND L. SMITH

Clerk

By Theodore Hocke

Chief Deputy Clerk

[Endorsed]: No. 11729. United States Circuit Court of Appeals for the Ninth Circuit. Western Air Lines, Inc., Appellant, vs. Labor Commissioner of the Division of Labor Law Enforcement, Department of Industrial Relations of the State of California, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed September 13, 1947.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for  
the Ninth Circuit.

In the Circuit Court of Appeals of the United States  
in and for the Ninth Circuit

No. 11729

WESTERN AIR LINES, INC.,

Appellant,

vs.

LABOR COMMISSIONER OF THE DIVISION OF  
LABOR LAW ENFORCEMENT, STATE OF  
CALIFORNIA,

Appellee.

1. STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY.
2. DESIGNATION OF RECORD NECESSARY FOR CONSIDERATION THEREOF.

(Per Rule 19, (6).)

To the Above Entitled Court and to the Clerk Thereof:

I.

Appellant intends to rely upon the following points:

1. The District Court of the United States in and for the Southern District of California, Central Division, had no jurisdiction to make the summary order appealed from because the subject matter of the order was not part of the controversy submitted to arbitration. (Railway Labor Act, Section 9, Subdivision 2 thereof.)

2. Appellee followed the wrong procedure in the District Court on the Order to Show Cause proceeding. The dispute between appellant and appellee was as to the appli-

cation of the arbitration award. The Railway Labor Act, Section 8, Sub-paragraph M, provides that such matters are to be referred back to the Board of Arbitration or to a subcommittee thereof for a further ruling. The agreement to arbitrate, Paragraph 15, also so provides. Appellee ignored this procedure.

3. The assignors of appellee are not entitled to the retroactive pay increase granted by the arbitration award to employees of appellant, because such assignors were not employees at the time the arbitration award was made on July 26, 1946. In other words, the assignors of appellee had left the employ of appellant before the arbitration award was made on July 26, 1946, and hence they are not entitled to the benefits of the retroactive pay increase granted employees of appellant under such award.

## II.

Appellant designates for printing the entire transcript.

Dated: September 22, 1947.

GUTHRIE, DARLING & SHATTUCK  
MILO V. OLSON

Attorneys for Appellant, Western Air Lines, Inc.

[Affidavit of Service by Mail.]

[Endorsed]: Filed Sep. 24, 1947. Paul P. O'Brien,  
Clerk.





No. 11729

IN THE

United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

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WESTERN AIR LINES, INC.,

*Appellant,*

*vs.*

LABOR COMMISSIONER OF THE DIVISION OF LABOR LAW  
ENFORCEMENT, DEPARTMENT OF INDUSTRIAL RELATIONS  
OF THE STATE OF CALIFORNIA,

*Appellee.*

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APPELLANT'S OPENING BRIEF.

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GUTHRIE, DARLING & SHATTUCK,  
737 Pacific Mutual Building, Los Angeles 14,  
*Attorneys for Appellant, Western Air Lines, Inc.*

MILO V. OLSON,  
*Of Counsel.*



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No. 11729

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

---

WESTERN AIR LINES, INC.,

*Appellant,*

*vs.*

LABOR COMMISSIONER OF THE DIVISION OF LABOR LAW  
ENFORCEMENT, DEPARTMENT OF INDUSTRIAL RELATIONS  
OF THE STATE OF CALIFORNIA,

*Appellee.*

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## APPELLANT'S OPENING BRIEF.

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A.

Statement Disclosing Basis on Which It Is Contended  
That the Circuit Court of Appeals Has Jurisdiction  
to Review the Order in Question.

The pleadings consist of the following:

1. Judgment confirming arbitration award and the arbitration award. [Tr. pp. 2 to 13, incl.]
2. Petition for Order to Show Cause filed by appellee as assignee of ex-employees of appellant. [Tr. pp. 14 to 25, incl.]
3. Order to Show Cause issued on said Petition. [Tr. p. 26.]



4. Statement of Reasons in Opposition to Order to Show Cause. [Tr. pp. 27 to 29, incl.]

5. Order of Compliance. [Tr. pp. 30 to 31, incl.]

6. Motion for Amendment to Order of Compliance. [Tr. pp. 31 to 33, incl.]

7. Amended Order of Compliance. [Tr. pp. 34 to 35.]

The appeal is taken from the last mentioned order.

The Circuit Court of Appeals has appellate jurisdiction to review said order.

U. S. Code, Title 28, Sec. 225, 28 U. S. C. A. 225;  
Rules of Civil Procedure, Rule 73.

The Notice of Appeal is set forth at page 37 of the Transcript.

## B.

### **The Statement of Case and the Questions Involved and the Manner in Which They Are Raised:**

#### *1. Statement of case:*

The appellee, that is, Labor Commissioner of the Division of Labor Law Enforcement, State of California, is the assignee of seven ex-employees of the appellant, Western Air Lines, Inc., and on their behalf appellee claims to be entitled to the benefit of retroactive pay increase granted to employees of appellant retroactively to January 1, 1946, as a result of an award made by a Board of Arbitration acting under and pursuant to the provisions of the Federal Railway Labor Act as amended, which

award was filed July 26, 1946, and confirmed by judgment confirming award on November 21, 1946. The assignors of appellee had all terminated their employment prior to July 26, 1946, and, therefore, were not employees of appellant, Western Air Lines, Inc., on the date the arbitration award was made, nor on the date that it was confirmed. The appellee filed a petition in the District Court for an Order to Show Cause to obtain an order requiring Western Air Lines, Inc., to pay the retroactive wage increase to the appellee as assignee of those ex-employees. This motion was opposed in the District Court, both by written opposition thereto, as shown in the Transcript, page 27, and by oral argument. Notwithstanding the objections thereto, an order was made requiring Western Air Lines, Inc., to pay the amount of the claimed retroactive wage increase to the appellee. The grounds of opposition to the making of this order and

2. *The questions involved on this appeal are as follows:*

a. *The District Court had no jurisdiction to make the summary order appealed from because the subject matter of the order was not part of the controversy submitted to arbitration. In other words, the Board of Arbitration did not have submitted to it as a question for decision whether ex-employees should be entitled to the benefit of the award or, for that matter, what persons constituted employees. The order confirming the award did not decide anything that had not been submitted to the Board of Arbitration for decision. Hence, there had been no*

adjudication on the question on which an Order to Show Cause should issue.

b. *That the controversy is really one as to the application of the arbitration award* and the procedure for such controversy is set up in the Railway Labor Act, Section 8 (m), which provides that such matters are to be referred back to the Board of Arbitration or to a subcommittee thereof for a ruling and, further, the agreement to arbitrate [Tr. pp. 20 and 21, paragraph Fifteen] also so provided; appellee ignored this procedure; and

c. In any event the *assignors of appellee are not entitled to the retroactive pay increase* granted by the arbitration award to employees of appellant because such assignors *were not employees* at the time the arbitration award was made on July 26, 1946.

3. Each of the foregoing questions was raised in the District Court on the Order to Show Cause proceeding by both written objections [Tr. p. 27] and oral objections made at the time of the hearing, and the questions are likewise raised on this appeal and set forth in the statement of points on which appellant intends to rely. [Tr. p 40.]

## POINT I.

**The Subject Matter of the Order to Show Cause Proceeding Was Outside of the Specific Issues Determined by the Arbitration Award and the Judgment Confirming the Award.**

A Petition for an Order to Show Cause is not an independent action and cannot ordinarily be made available to dispose of the merits of a controversy.

19 Ruling Case Law 671;

*Hall Oil Co. v. Barquin*, 33 Wyo. 92, 237 Pac. 255;

*Difani v. Riverside Oil Co.*, 201 Cal. 210 at 213;

*People v. Ah Sam*, 41 Cal. 645, 650.

The court must have jurisdiction of the subject matter to confer jurisdiction to make an order on a motion.

*Sawyer v. Ellis*, 37 Ariz. 443, 295 Pac. 322.

The court's jurisdiction, therefore, to make the order appealed from [Tr. p. 34] was necessarily dependent upon whether it had jurisdiction of the subject matter, which in turn depended upon what questions had been decided by the arbitration award and confirmed by the judgment confirming the award. That judgment merely provided, "that said award be and the same is hereby confirmed." [Tr. p. 13.]

The (Federal) Railway Labor Act, Section 9, subparagraph Second, provides that after an award is acknowledged and filed, it "shall be conclusive on the parties as to the merits and *facts of the controversy submitted to arbitration* \* \* \*." The agreement to arbitrate is set

forth as Exhibit A to the Petition for Order to Show Cause [Tr. pp. 18 to 25, incl.], and under paragraph Fourth thereof it is stated, "the specific questions to be submitted to the Board for decision are as follows: Shown in Appendix A and Appendix B and made a part hereof. Fifth: In its award the Board shall confine itself strictly to decision as to the questions so specifically submitted to it."

If reference is made to Appendix A [Tr. p. 22] and Appendix B [Tr. p. 24], it becomes readily apparent that the question as to who should constitute employees, that is, was an ex-employee entitled to retroactive pay increase or not, was not one of the questions submitted to the Board of Arbitration for decision. Of course, that is the precise question that the District Court purported to determine. In accordance with the provisions of Railway Labor Act above cited, that question had not been adjudicated, there was no decision thereon and it was improper in such a summary proceeding as an Order to Show Cause proceeding for that subject to be determined. Pursuant to the provisions of the Railway Labor Act, Section 9, paragraph Second, the judgment in the District Court confirming the award [Tr. p. 13] did not change nor add to the general rule that a valid arbitration award operates to merge and extinguish all claims embraced in the submission so that thereafter the submission and an award furnish the only basis by which the rights and liabilities of the parties can be determined.



However, an award will not operate to merge and bar any matters except such as were comprehended within the scope of the submission and passed on by the arbitrators.

6 C. J. S. 242.

*Roanoke Rapid Power Co. v. Roanoke Nat. etc. Co.*, 75 S. E. 29, 159 N. C. 393;

*Callier v. White*, 12 So. 385, 97 Ala. 615.

The scope of the submission or the matters which the arbitrators may decide is determined by the intention of the parties as ascertained from the submission.

6 C. J. S. 221.

"The jurisdiction of the arbitrators cannot be extended beyond the contract of submission by their decision on any jurisdictional question."

*Bartlett v. Bartlett*, 116 Wisc. 450, 93 N. W. 473.

In his action in the matters submitted to arbitration it is very apparent that the submission was not general but very special or restricted. [Tr. p. 19, paragraphs Fourth and Fifth; Tr. p. 22, Appendix A, "Wages"; Tr. p. 24, Appendix B, "Working Conditions."]

It is the rule where the submission is special or restricted that the award must be limited to the particular matters under submission.

6 C. J. S. 622.

One can look in vain and find nothing in the agreement of submission in this proceeding that states that ex-employees, that is, employees who terminated their employment with Appellant Western Air Lines, Inc., prior to the making of an arbitration award, should be entitled to retroactive pay increase. In other words, the question

of what persons constitute employees was not one of the specific questions submitted to arbitration and was not decided by the Board of Arbitration and hence not confirmed by the order confirming the award. It follows that the order confirming the award could not have adjudicated that question and the District Court therefore lacked jurisdiction to issue an order on an Order to Show Cause proceeding, necessarily based on the order confirming the award, whereby appellant Western Air Lines, Inc., was directed to pay ex-employees of Western Air Lines, Inc., (that is, their assignee, the appellee) retroactive wage increase.

Further, of course, the factual situation giving rise to the question of whether ex-employees were entitled to retroactive pay or not was a factual matter that arose after submission to arbitration. It is the rule that arbitrators cannot include in their award and make decisions on matters arising after the date of submission.

6 C. J. S. 224;

*Bell v. McKay and Co.*, 72 So. 83, 196 Ala. 408.

The scope of the judgment confirming the award must conform to the award.

6 C. J. S. 280;

*Cummington Realty Associates v. Whitten*, 132 N. E. 53, 239 Mass. 313.

Of course, the Railway Labor Act, Section 9, paragraph Second, the statute under which the judgment confirming the award in question was made, specifically so provides. It follows that the court exceeded its jurisdiction in making the order appealed from, and Western Air Lines, Inc., is entitled to have a trial on the merits of the controversy—this it has not had.

## POINT II.

### Appellee Followed Wrong Procedure in Using Order to Show Cause Proceeding in the District Court.

It appears that a difference has arisen as to the application of the provisions of the arbitration award. A definite procedure is provided both by the agreement to arbitrate [Tr. p. 20, paragraph Fifteenth], and by the Railway Labor Act, Section 8(m) thereof, which procedure was ignored and was not followed by appellee. The agreement to arbitrate provides "any difference arising as to the meaning or application of the provisions of such award shall be referred for a ruling to the Board or to a subcommittee of the Board agreed to by the parties hereto; and such ruling when certified under the hands of at least a majority of the members of such Board, or if a subcommittee is agreed upon, at least a majority of the members of the subcommittee, and when filed in the same District Clerk's office as the original award, shall be a part of and shall have the same force and effect as such original award."

Railway Labor Act, Section 8(m) uses the same language as above set out. The appellee and appellee's assignors failed to follow the procedure outlined by the Railway Labor Act or as required by their agreement. By reason thereof, appellee followed the wrong course of procedure in the District Court. In view of the agreement and the statute, appellee is estopped and should be held estopped from obtaining relief on the Order to Show Cause. The condition precedent imposed on the assignors of appellee was not complied with.

### POINT III.

**In Any Event, Only Employees of Western Air Lines, Inc., on July 26, 1946, the Date of the Arbitration Award, Are Entitled to the Benefits of the Award.**

The assignors of appellee were not employees of Western Air Lines, Inc., on July 26, 1946, the date the arbitration award was made. [Tr. pp. 15-16.] The obvious purpose of allowing employees retroactive wage increase while an arbitration board is considering the question of wage increase is to keep the employees on the job and to avoid a strike. That is the moving consideration for such retroactive pay increase. Obviously, an employee who quits during that period has eliminated the reason for retroactive pay. By reason thereof, such ex-employees are not entitled to the benefits of retroactive pay fixed by an arbitration award made after the employees have quit. [Tr. p. 28.]

The foregoing point appears to be one of almost first impression; however, it is discussed in the case of *In re Goodyear Tire & Rubber Co.*, Vol. 2, Labor Arbitration Reports 367 at 373. Also reported in Vol. 5, Prentice-Hall Labor Service, paragraph 67242, decided April 3, 1946. The rule appears to be as appellant contends.

**Conclusion.**

Each of the foregoing points was urged by appellant in the lower court and the Statement of Reasons in Opposition to the Order to Show Cause, filed by appellant in the District Court, and included in the Transcript on Appeal [pages 27 to 29, inclusive], could almost be deemed appellant's brief.

By reason of all of the foregoing it appears that it was error for the District Court to make the Amended Order of Compliance and the order should be reversed.

Respectfully submitted,

GUTHRIE, DARLING & SHATTUCK,  
*Attorneys for Appellant, Western Air Lines, Inc.*

MILO V. OLSON,  
*Of Counsel.*





No. 11729.

IN THE  
United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

---

WESTERN AIR LINES, INC.,

*Appellant,*

*vs.*

LABOR COMMISSIONER OF THE DIVISION OF LABOR LAW  
ENFORCEMENT, DEPARTMENT OF INDUSTRIAL RELA-  
TIONS OF THE STATE OF CALIFORNIA,

*Appellee.*

---

APPELLEE'S BRIEF.

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PAULINE NIGHTINGALE, and  
EDWARD M. BELASCO,

By PAULINE NIGHTINGALE,  
503 State Building, Los Angeles 12,  
*Attorneys for Appellee.*



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No. 11729.

IN THE

United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

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WESTERN AIR LINES, INC.,

*Appellant,*

*vs.*

LABOR COMMISSIONER OF THE DIVISION OF LABOR LAW  
ENFORCEMENT, DEPARTMENT OF INDUSTRIAL RELA-  
TIONS OF THE STATE OF CALIFORNIA,

*Appellee.*

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APPELLEE'S BRIEF.

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**Jurisdiction.**

This is an appeal from an Amended Order of Compliance [Tr. pp. 34-35] issued by the District Court of the United States for the Southern District of California, Central Division, to enforce a Judgment Confirming Award [Tr. p. 13] made and entered by it on November 21, 1946 pursuant to the following provisions of the Railway Labor Act, 45 U. S. Code, Section 159:

"Sec. 9. First. The award of a board of arbitration, having been acknowledged as herein provided, shall be filed in the clerk's office of the district court designated in the agreement to arbitrate.

"Second. An award acknowledged and filed as herein provided shall be conclusive on the parties as

to the merits and facts of the controversy submitted to arbitration, and unless, within ten days after the filing of the award, a petition to impeach the award, on the grounds hereinafter set forth, shall be filed in the clerk's office of the court in which the award has been filed, the court shall enter judgment on the award, which judgment shall be final and conclusive on the parties."

### Statement of Case.

On May 10, 1946 the Appellant and its employees, including Appellee's assignors, entered into an arbitration agreement [Tr. pp. 18-26, incl.] pursuant to the provisions of the Railway Labor Act, 45 U. S. Code, Sections 151-188. Section *Eleventh* of the agreement provided that the award of the Board of Arbitration shall become effective as of January 1, 1946 [Tr. p. 20]. The matters submitted to the Board by the arbitration agreement related, 1, to wages; 2, to working conditions [Tr. p. 4].

On July 26, 1946 the Board duly filed its Award with the Clerk of the District Court [Tr. pp. 2-12, incl.], and on November 21, 1946 a Judgment Confirming Award was made and entered by the District Court [Tr. p. 13].

The Appellant having failed and refused to pay to assignors of Appellee the wage increases granted by the Award [Tr. pp. 15-17, incl.], the Appellee herein petitioned the District Court on June 9, 1947 for an order directing the Appellant to comply with the Award [Tr. pp. 14-25, incl.]. After hearing and considering both

oral arguments and written objections by the Appellant, the Court below rendered its Amended Order of Compliance [Tr. pp. 34-35, incl.] from which this appeal was taken.

There is no dispute between the parties as to the facts involved, namely: that assignors of Appellee were employees of the Appellant at the time the matter as to wages and working conditions was submitted to arbitration; that their employment terminated prior to the filing of the Award; and that the sum of \$562.21 is the correct amount of the difference between the wages paid the said employees and the wages granted by the Award, which sum the District Court ordered Appellant to pay.

### **Questions Presented.**

The main questions raised by the Appellant in opposing the proceeding in the Court below and on this appeal concern the right of Appellee's assignors to the wages granted by the Arbitration Award and the power of the District Court to order the Appellant to comply with the said Award by paying the wages granted therein.

### **Summary of Argument.**

A. The assignors of Appellee are entitled to the wages granted by the Arbitration Award.

B. The District Court had the power to order the Appellant to pay the wages granted by the Award.

## ARGUMENT.

### A. The Assignors of Appellee Are Entitled to the Wages Granted by the Arbitration Award.

The assignors of Appellee were parties to the arbitration agreement [Tr. p. 18] and are therefore entitled to the benefits of the Award. The fact that the Award was filed on July 26, 1946 after the termination of the employment relationship between the said assignors and the Appellant does not determine its effective date where the arbitration agreement between the parties specifically sets forth the effective date as follows:

“Eleventh: The award of the Board shall become effective as of January 1, 1946 and as to schedule ‘B’, appended hereto, shall remain in effect for one (1) year and thereafter subject to thirty (30) days notice under provisions of Section 6, Title I, of the Railway Labor Act, as Amended. As to schedule ‘A,’ appended hereto, the award of the Board shall become effective January 1, 1946 and remain in effect for sixty (60) days from the date of such award and subject to change thereafter under provisions of Section 6, Title I, of the Railway Labor Act, as Amended.” [Tr. p. 20.]

It clearly appears from the aforesaid provision of the arbitration agreement that the wages granted by the Award were to be effective as of January 1, 1946. Furthermore, nothing contained in the Award or the arbitration agreement requires that Appellee’s assignors be in the employ of the Appellant on the date that the Award is filed to entitle them to its benefits. Appellant in main-

taining that contention is in effect asking the Court to write a condition into the Award or arbitration agreement which was never intended by the parties.

It is a general rule that an award will be given a liberal construction and everything will be intended in its favor as far as possible. Any ambiguity in the words of an award should be settled in the way which will best coincide with the apparent intention of the arbitrators, and the Court, by intendment, will restrain general terms in an award to apply to particular words in the submission as to connect the particular thing awarded with the general words of the submission.

3 Am. Jur. 950, 951;

6 C. J. S. 238.

**B. The District Court Had the Power to Order the Appellant to Pay the Wages Granted by the Award.**

The Court in ordering Appellant to pay the wages granted by the Award was simply exercising its inherent power to enforce the judgment made and entered by it on November 21, 1946 [Tr. p. 13]. As a general rule, a party recovering judgment has the right to proceed to enforce it, and the Court rendering judgment has inherent power to enforce it and to make such orders and issue such process as may be necessary to render it effective.

49 C. J. S. 1071;

*Security Trust & Savings Bank v. Southern Pacific Railroad Co.*, 6 Cal. App. (2d) 585, 589, 45 P. (2d) 268, 270.



There is no merit to Appellant's contention that the Order of Compliance rendered by the Court was beyond the scope of the Award or the matters submitted by the arbitration agreement. The arbitration agreement clearly submitted the matter of wages for decision [Tr. p. 19, paragraph Fourth; Tr. p. 22, Appendix A, "Wages."] and the Award obviously related to wages [Tr. p. 4]. It follows, therefore, that the Order of Compliance directing Appellant to pay the wages granted by the Award, in a sum which the Appellant admits it has failed to pay Appellee's assignors, squarely falls within the scope and purview of the submission and Award.

Appellant further contends that Appellee is estopped from obtaining relief in the District Court since it failed first to refer the matter for a ruling from the Arbitration Board pursuant to Section 8(m) of the Railway Labor Act (45 U. S. Code, Section 158) and the agreement to arbitrate [Tr. p. 20, paragraph Fifteenth]. The fallaciousness of the foregoing contention is readily apparent when it is borne in mind that Appellee is not seeking a modification or clarification of the Award, which might require a ruling of the Board, but is merely seeking to enforce it. It is the Appellant which is attempting to change the terms or conditions of the Award by asking the Court to exclude the Appellee's assignors from its benefits. This, Appellee submits, Appellant cannot do in any event since the Award has become final by judgment.

### Conclusion.

Under the provisions of Section 9, paragraph Second of the Railway Labor Act (45 U. S. Code, Section 159) the Award is conclusive on the parties as to the merits and facts of the controversy submitted to arbitration unless within ten days after the filing of the Award a petition to impeach the Award is filed. The Award in the instant case was filed on July 26, 1946 and no petition for its impeachment was ever made. Neither was an appeal taken from the Judgment confirming Award [Tr. p. 13] which judgment is also final and conclusive on the parties. Appellant cannot now attack the Award and Judgment Confirming Award in this proceeding to enforce it. It is, therefore, urged that the Amended Order of Compliance of the District Court be affirmed.

Respectfully submitted,

PAULINE NIGHTINGALE, and  
EDWARD M. BELASCO,

By PAULINE NIGHTINGALE,  
*Attorneys for Appellee.*



No. 11729  
IN THE  
United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

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WESTERN AIR LINES, INC.,

*Appellant,*

*vs.*

LABOR COMMISSIONER OF THE DIVISION OF LABOR LAW  
ENFORCEMENT, DEPARTMENT OF INDUSTRIAL RELA-  
TIONS OF THE STATE OF CALIFORNIA,

*Appellee.*

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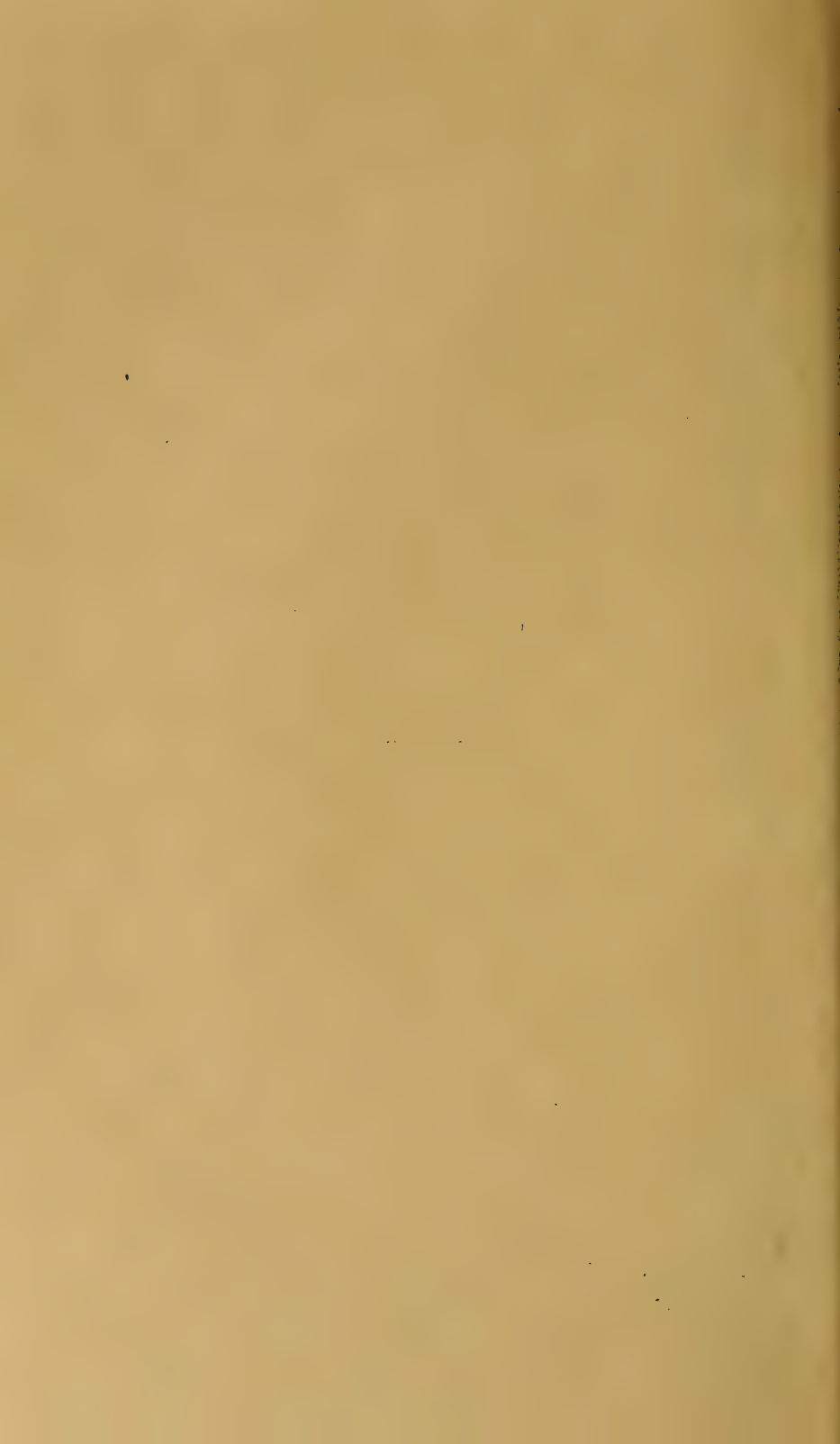
APPELLANT'S REPLY BRIEF.

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Upon Appeal from the District Court of the United States  
for the Southern District of California,  
Central Division

GUTHRIE, DARLING & SHATTUCK,  
737 Pacific Mutual Building, Los Angeles 14,  
*Attorneys for Appellant.*

MILO V. OLSON,  
*Of Counsel.*





No. 11729  
IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

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WESTERN AIR LINES, INC.,

*Appellant,*

*vs.*

LABOR COMMISSIONER OF THE DIVISION OF LABOR LAW  
ENFORCEMENT, DEPARTMENT OF INDUSTRIAL RELATIONS  
OF THE STATE OF CALIFORNIA,

*Appellee.*

---

**APPELLANT'S REPLY BRIEF.**

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I.

In the Brief of Appellee it is assumed that because the arbitration committee was to determine the amount of wages, therefore, the District Court had power to order Appellant to pay retroactive wage increase to assignors of Appellee. This assumption begs the question. Appellant concedes that the award of the arbitration board determined the question of the amount of wage increase that employees of Western Air Lines were to receive. But that is not the question now at issue. The question is, whether ex-employees are entitled to the benefit of retroactive pay increase. In other words, the question as to what persons are employees of Western Air Lines was never presented to the Board of Arbitration for determination. Thus, the Appellee has failed to answer by its brief that important point made by Appellant.

## II.

The difference that now exists between Appellant and Appellee arises as a result of a dispute as to the application of the award. In Point II of Appellant's Opening Brief it appears when such a difference arises the procedure required by law and the procedure the assignors of Appellee agreed to was ignored by Appellee. Appellant does not ask that the arbitration award be modified, it merely insists that Appellee must comply with the provisions of the agreement to arbitrate and with the law. Appellant concedes that the judgment made confirming the arbitration award is final as to matters determined by the Board of Arbitration, but it does not concede that it in any way determined the issues involved on this appeal which were never presented to the Board of Arbitration for decision. By reason of points hereinbefore made, the District Court had no jurisdiction to make the summary order appealed from.

### Conclusion.

Appellee has failed to meet the points urged by Appellant. The reasons urged by Appellant for reversal are well taken and the order appealed from should be reversed.

Respectfully submitted,

GUTHRIE, DARLING & SHATTUCK,

By MILO V. OLSON,

*Attorneys for Appellant.*

No. 11730.

IN THE  
United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

---

LEONARD JOSEPH MORANDY,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

APPELLEE'S BRIEF.

---

JAMES M. CARTER,  
*United States Attorney;*

ERNEST A. TOLIN,  
*Chief Assistant U. S. Attorney,*  
United States Postoffice and  
Courthouse Bldg., Los Angeles (12),  
*Attorneys for Appellee.*

JUN 5 - 1946



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No. 11730.

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

---

LEONARD JOSEPH MORANDY,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

## APPELLEE'S BRIEF.

---

### Jurisdictional Statement.

A. The United States District Court for the Southern District of California had jurisdiction of appellant and the subject matter.

B. This Court has jurisdiction of the appeal.

C. The offense charged was triable by the District Court under authority of Title 18, United States Code, Section 408, wherein the offense was defined, and of Title 28, United States Code, Section 41, Subdivision 2, which confers jurisdiction to try the case upon the District Court. This Court has jurisdiction of the appeal, under the provisions of Title 28, United States Code, Section 225 (a) and (d), which treat of the jurisdiction of Courts of Appeal.

## Statement of the Case.

On August 20, 1947, appellant was indicted by the Grand Jury for the Southern District of California. The Indictment contained one count, wherein appellant was charged with violation of United States Code, Title 18, Section 408, variously known as the Dyer Act and the National Motor Vehicle Theft Act.<sup>1</sup> He was accused of transporting a certain stolen motor vehicle, namely, a 1942 Mercury Convertible Coupe, Motor No. 99A-506084, from Whiting, Indiana, to Santa Barbara County, California, having knowledge that the motor vehicle had been stolen. Trial was had on September 9 and 10, 1947. The jury returned a verdict of "Guilty." On October 12, 1947,

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<sup>1</sup>*"Motor vehicles and aircraft; transportation, etc. of stolen vehicles and aircraft.*

"This section may be cited as the National Motor Vehicle Theft Act. The term 'motor vehicle' when used in this section shall include an automobile, automobile truck, automobile wagon, motorcycle, or any other self-propelled vehicle not designed for running on rails and the term 'aircraft' means any contrivance now known or invented after September 24, 1945, used, or designed for navigation of or for flight in the air; the term 'interstate or foreign commerce' shall include transportation from one State, Territory, or the District of Columbia, to another State, Territory, or the District of Columbia, or to a foreign country, or from a foreign country to any State, Territory, or the District of Columbia. Whoever shall transport or cause to be transported in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be punished by a fine of not more than \$5,000, or by imprisonment of not more than five years, or both. Whoever shall receive, conceal, store, barter, sell, or dispose of any motor vehicle or aircraft, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be punished by a fine of not more than \$5,000, or by imprisonment of not more than five years, or both. Any person violating this section may be punished in any district in or through which such motor vehicle or aircraft has been transported or removed by such offender. As amended Sept. 24, 1945, c. 383, §§1, 2, 59 Stat. 536."

he made an alternate motion for new trial and judgment of acquittal. These motions were denied and appellant was sentenced to imprisonment for a period of three years in the custody of the Attorney General. On October 16, 1947, after having filed Notice of Appeal herein, appellant made oral application to the Court, wherein he was convicted for admission to bail pending appeal. The motion was heard by Honorable Leon R. Yankwich, District Judge, upon oral notice and was denied. The Court at that time made a statement finding that there was no substantial question on appeal and in that statement, discussed the reasons why the Court found there was not a substantial question on appeal and directed the United States Attorney to submit a transcript of the proceedings had on that day should a motion for bail on appeal be made in this Court. A transcript of the proceedings in the District Court on motion to fix bail on appeal has heretofore been filed in this Court. Therein the Trial Judge incorporated by reference his remarks in denying a motion for new trial. The proceedings on motion for a new trial are reported in Vol. II of the Transcript of Record at page 142. The remarks of the Trial Judge commence at page 149.

### **Questions Involved in the Appeal.**

The questions in this appeal appear to be:

1. Is the Evidence Sufficient to Support the Verdict of Guilty?
2. Did the District Court Commit Reversible Error in Denying Appellant's Motion for a Bill of Particulars?
3. Did the District Court Adequately Instruct the Jury?

### Synopsis of Testimony.

On February 5, 1946, Hope W. Bloemen was the owner of a 1942 green Mercury Convertible Club Coupe [Rep. Tr. 3]. She last saw the vehicle that day [Rep. Tr. 4]. She lived in Lowell, Indiana [Rep. Tr. 8]. The motor number of the vehicle was 506084 [Rep. Tr. 6-7]. It bore Indiana license plates [Rep. Tr. 3].

On said day Mrs. Bloemen's husband drove it to his place of employment in Whiting, Indiana, and parked it on the street at about 8 A. M. [Rep. Tr. 12-13]. When he returned for it at 4:30 P. M. that day, it was gone. He had not given anyone permission to remove it and has not seen it since [Rep. Tr. 13]. Mrs. Bloemen had given permission to her husband to take the car but had not given anyone else such permission [Rep. Tr. 15].

On April 6, 1946, appellant registered at an auto court in Oxnard, California. He used the alias John R. Harrison and printed the name on the auto court register [Rep. Tr. 73-77]. At that time he was in possession of a green Convertible Mercury Coupe, which bore a Minnesota license plate and to which there was attached a trailer which had an Iowa license plate [Rep. Tr. 76]. A man whose true name was John Richard Harrison had been the victim of a theft from his parked automobile in Chicago in 1945. He had been a lieutenant in the parachute troops. Among the things stolen were two so-called "dog tags" being Army identification tags [Ex. 4]. Appellant was a stranger to Mr. Harrison [Rep. Tr. 93-95].



Appellant left Mrs. Rainer's auto court April 13, 1946, having paid for an additional week's accommodation. He left the trailer in the camp and never returned. He did not leave a forwarding address. In April, 1946, he appeared in Paso Robles, California, and showed a relative by marriage a green Convertible automobile and referred to it as his car [Rep. Tr. 38-44]. At about the same time Jack Loy, a sixteen year old high school student, had a conversation with appellant at Paso Robles in the course of which appellant said he had traded an automobile for one he then displayed to the witness. The car thus shown was a green Convertible Mercury. Late in 1945 appellant had represented himself to a new acquaintance to be John Harrison [Rep. Tr. 91].

On April 10, 1946, a Santa Maria, California, police officer had a conversation with appellant in that city. At that time appellant told the officer that his name was Friedman. He displayed identification papers which the officer returned to him. Said papers contained an Army identification card permitting one Friedman, an Army officer, to leave an Army Base, and showed military records of promotion of an officer in the Army through various ranks up to Major. The police officer testified that he had returned the papers to the appellant, but said he thought the name shown was Leonard Friedman [Rep. Tr. 65-68]. On April 11, 1946, Arnold Reiland, Identification Officer and Fingerprint Technician in the Santa Maria Police Department [Rep. Tr. 22-28] took appellant's fingerprints on Government's Exhibit 11. That exhibit is a record of

a case handled by the Santa Maria Police Department against one Morris Friedman, prosecuted for petty theft. All parts of the record showing that it had been taken as part of a criminal prosecution were covered before the exhibit was available to the jury, and all proceedings in which the fact that the record was in connection with an arrest occurred out of the jury's hearing [Rep. Tr. 28-31]. Appellant had signed the name Morris Friedman on the card [Ex. 6] in the presence of the officer who took fingerprints thereon.

A Morris Friedman had been a Major in the Army Air Corps until December, 1945, and an Engineer in Chicago, Illinois, since that time [Rep. Tr. 68-72].

On April 14, 1946, a police officer of the City of Santa Maria, California, found a 1942 green Mercury Convertible Coupe, bearing Minnesota license plates, parked on a public street in Santa Maria [Rep. Tr. 16-18]. He searched the car and found an Iowa 1946 license plate [Ex. 1] under the floor mat. At another place, under the floor mat, he found a Michigan 1946 license plate [Ex. 2]. On the rear of the car was a 1946 Minnesota license plate [Ex. 3]. The ignition keys were in the ignition switch and attached to the same chain was Government's Exhibit 4, the two name plates bearing the name John R. Harrison [Rep. Tr. 19], which Mr. Harrison had identified as his Army "dog tags" and which had been stolen from his automobile in Chicago in 1945 [Rep. Tr. 93-95].

Identification Expert Reiland, of the Santa Maria Police Department, examined the car for latent fingerprints

[Rep. Tr. 22-24] and found one on the chrome molding of the right window [Rep. Tr. 27, 31; Ex. 5]. He compared that print with those which had been taken by him from the appellant three days before [Ex. 6; Rep. Tr. 32]. The fingerprint taken from the car was identical to that of the left index finger of appellant [Rep. Tr. 33].

On April 11, 1946, the same day appellant's fingerprints were taken by the Santa Maria Police Officer, one Charles Taylor gave appellant a ride in a County car from Santa Maria to Santa Barbara. Appellant told Taylor he was going to Oxnard, and did not say anything about an automobile [Rep. Tr. 84-86]. This was three days prior to discovery of the 1942 green Mercury Convertible Coupe on the street at Santa Maria.

When the automobile involved was found in Santa Maria, Officer Reiland, of that City's Police Department, examined the motor of the car and found the motor number to be 99A506084. He recorded that fact on Exhibit 5 which also contains the fingerprint of appellant which had been found upon the vehicle [Rep. Tr. 50-51; Ex. 5]. The ignition key was in the lock, and was attached to a chain to which Mr. Harrison's "dog tags" were also attached.

## ARGUMENT.

### **The Verdict of Guilty Is Supported by the Evidence.**

The motor vehicle involved was described by its owner as (1) a 1942 (2) green (3) Mercury (4) Convertible (5) Coupe (6) Motor Number 506084 (7) licensed in Indiana and stolen in that state February 5, 1946.

On April 6th appellant was seen in possession of the automobile. He registered at an Oxnard, California, auto court that day. To the circumstance of possession shortly after the theft, he added these indicia of guilt: (1) He registered under an assumed name, using the name of a man who had lost certain identification material in a theft; (2) He was in possession of some of said material; (3) He printed, rather than wrote, his name on the register. It is common knowledge that handwriting experts find difficulties in comparison of printing which are not present in studying written matter; (4) Seven days later he left the auto court, one week before his paid rental would have expired; (5) He did not leave a forwarding address; (6) He abandoned a trailer he had brought with him; (7) The automobile and trailer bore (without explanation) license plates from different states; (8) Shortly thereafter appellant displayed the automobile to friends in Paso Robles and claimed it to be his property; (9) Four days after leaving Oxnard, appellant was fingerprinted by police in Santa Maria; (10) On being questioned by police at that time, he gave another alias, different from Harrison; (11) The new alias was the true name of an Army Officer some of whose papers ap-



pellant possessed; (12) He signed said alias to his fingerprint record in the police station and was prosecuted under the same alias, Morris Friedman; (13) The same day he started a return trip to Oxnard, accepting a ride in another man's automobile (14) leaving the stolen green Mercury Convertible Coupe unclaimed and unprotected parked on the street at Santa Maria unlocked and with the key in the ignition switch (15) containing the name plates which had been stolen from John R. Harrison, whose name he had used except on the occasion of being questioned and fingerprinted by police at Santa Maria: (16) In the stolen motor vehicle thus abandoned by him were hidden other foreign license plates the possession of which has never been explained.

It is significant that appellant, whose true name is Morandy, hid under the alias of Harrison when in Oxnard, but when involved with the police in Santa Maria four days later, suddenly switched his alias to Friedman. At the time of this change in names the stolen automobile, containing Mr. Harrison's Army "dog tags" in the key chain, was parked on a public street in Santa Maria. Appellant made his peace with the law enforcement authorities in that city, and, under a name disassociated with his use and possession of the stolen motor vehicle, left town as a rider in another car, abandoning the expensive stolen car rather than risk being connected with that vehicle. Under the circumstances of a contact with the police, Morandy, who had posed as Harrison, assumed the cloak of Friedman and abandoned use of the alias which appeared on the ignition key chain of the stolen car. He took "flight" from the loot as well as from the name that connected him with it.



The following cases hold that unexplained possession of stolen property shortly after the theft is evidence of guilt:

*Di Carlo v. United States*, 64 F. (2d) 15 (C. C. A. 2d);

*Wolf v. United States*, 36 F. (2d) 450 (C. C. A. 7th);

*Boehm v. United States*, 271 Fed. 454 (C. C. A. 2d);

*Pearlman v. United States*, 10 F. (2d) 460 (C. C. A. 9th) (Auto Case);

*Girson v. United States*, 88 F. (2d) 358 (C. C. A. 9th), cert. den. 301 U. S. 697;

*Wilkerson v. United States*, 41 F. (2d) 654 (C. C. A. 7th) (Auto Case);

*Wilson v. United States*, 162 U. S. 613.

The law on sufficiency of evidence declared in those cases is epitomized in *Wilkerson v. United States*, 41 F. (2d) 654, at 657, as follows:

“The remaining fact to be proved by the government to warrant conviction is that appellant, at the time he purchased the auto, knew that it was stolen property. Possession of the fruits of crime recently after its commission justifies the inference that the possession is guilty possession, and, though only *prima facie* evidence of guilt, may be of controlling weight unless explained by the circumstances or accounted for in some way consistent with innocence. This presumption applies as well to a person charged with unlawfully receiving stolen goods as to one charged with its original taking. If it raises a presumption of guilt as to the more serious crime, much more should it be evidence of the guilt implied in the

lesser offense. It is a question for the jury whether the inference of appellant's guilty reception of the automobile, arising from his possession thereof within a short time after the theft, was overcome by the explanation. *Rosen v. United States* (C. C. A.), 271 F. 651; *Drew v. United States* (C. C. A.), 27 F. (2d) 715; *Wilson v. United States*, 162 U. S. 613, 16 S. Ct. 895, 40 L. Ed. 1090. Appellant acquired possession of the auto within 16 days after it had been stolen, and while presumption of guilt, flowing from possession of recently stolen property, grows weaker as the time of the possession recedes from the time of the theft, yet it is for the jury to determine when the inference of guilt is overthrown by the length of possession."

Appellant has attacked the identification of the motor vehicle; claiming it to be insufficient because the owner of the stolen automobile, in giving the motor number recalled the number to be 506084. The Santa Maria Police Officer found, on examining the motor, that said number was preceded by the symbol 99A. In commenting on this argument at the time of ruling on motion for a new trial, the District Judge said [Rep. Tr. 154]:

"On the question of ownership we find that this coupe, first of all, was not an ordinary model car. It was a Mercury Convertible; it was a green Mercury convertible; it was a green Mercury convertible coupe. The year was 1942. The engine is not a movable part. It isn't like a wheel. It is a part which, of course, in the modern automobile can be taken apart. But, as a matter of fact, it has more permanence than any other part of the automobile, and the mere removing of it is a very, very difficult mechanical operation. No one but a skilled mechanic can re-

move an engine from a car. It isn't like a wheel or a spare tire, which anyone can remove who knows how to handle a jack. The engine was identified by the owner by the last numbers thereof."

Appellant contends that there is a variance between pleading and proof because the true owner in recalling the motor number, aided in memory by a memorandum, failed to recall that portion of the number which preceded the hyphen, namely 99A. This argument overlooks the fact that the automobile was otherwise well described and the identification officer of the Santa Maria Police Department found the motor number to be exactly as stated by the owner, plus the prefix 99A. Hence, there is testimony in the record by which every mark of identification mentioned in the indictment is recited in the evidence. This is more than this Court required in *Pearlman v. United States*, 10 F. (2d) 460 (C. C. A. 9). In that case the indictment referred to the motor number as 18664. The true motor number was found to be 61-A-130. The statute under which appellant was convicted is not one which denounces the interstate transportation of stolen motors, but rather, of stolen motor vehicles.

This Court in commenting on the failure of an appellant to explain possession of stolen goods, said:

"\* \* \* We believe it is apparent from the complete instruction that, if the jury found (1) that appellants were in possession of property alleged to be stolen, (2) which was in fact stolen, then, in the absence of an explanation justifying the possession, it was a circumstance tending to show guilt. We believe that to be a correct statement of the law \* \* \*."

*Girson v. United States*, 88 F. (2d) 358 (C. C. A. 9).

In the case now before the Court, appellant never made any explanation of his possession except that in the testimony of Government witnesses it appears that in speaking to certain friends he said that the motor vehicle was his, but qualified that position when the police were after him in another connection by taking care not to even use the name by which he was linked to the car, but rather, to adopt a different alias, abandon the vehicle, and get out of town by courtesy transportation.

### **The Court Did Not Err in Denying the Motion for a Bill of Particulars.**

The granting of a bill of particulars is a discretionary matter.

*Rubio v. United States*, 22 F. (2d) 766 (C. C. A. 9);

*Robinson v. United States*, 33 F. (2d) 238 (C. C. A. 9).

The bill sought in this case if granted and supplied appellant, could not have aided him. It would not have made any difference to the issue of theft whether the chattel stolen was the vehicle of X or of Y, neither do the place and date of the true owner's acquisition bear upon the issue of whether appellant transported the motor vehicle in interstate commerce knowing it to have been stolen. The demand to be informed of the type of automobile and of the engine number had already been anticipated by reciting those details in the indictment.



### The Court Adequately Instructed the Jury.

Appellant's Instruction Number 3 does not correctly state the law. The refusal to give that instruction is cited by him as error. Said instruction as offered was:

"If the automobile came to rest in the State of California, even after having been stolen, and thereafter was transported by the defendant within the State of California only, the defendant would not be guilty of the offense charged and it would be your duty to acquit him." [Clk. Tr. 25.]

In offering that instruction, appellant ignored the charge that he was accused of having transported the vehicle from a point in Indiana to a destination in California. Had the proposed instruction been given, it would have in effect told the jury to acquit defendant if he had transported the vehicle within California only, after it had come to rest here, *even though he had been the one who brought it to rest in California, after having transported it to this State from Indiana with knowledge that it was stolen.*

Instead of the proposed inaccurate instruction, the Court gave the following:

"The government has offered evidence to the effect that the Mercury Coupe in question was stolen from its owner on or about February 5, 1946, at Whiting, Indiana, and that this same car was found in the possession of the defendant on or about April 11, 1946, at Santa Maria, California.

"You are instructed that the mere finding of an automobile at a given location is not any proof that the defendant stole the automobile or any proof that he transported it, knowing it to have been stolen.



“The government has the burden of proving: the allegations of the indictment, that is, (1) that the defendant had knowledge that the particular vehicle was stolen, and (3) that he transported the particular vehicle in interstate commerce or across state lines. If the government has failed to prove these essentials of the indictment, or either of them, you must acquit the defendant.

“You are instructed that the possession of stolen property in another state than that in which it was stolen after the theft, raises no presumption that the possessor transported the stolen property in interstate commerce.

“Proof that an accused merely drove a stolen automobile from one point in the state to another point or to several points in the state would not in itself constitute a violation of the statute involved in this case.

“However, the law is that the possession of the fruits of a crime recently after its commission,—namely, here, the automobile, in the absence of an explanation justifying the possession, warrants an inference pointing towards guilt. The inference fades as time elapses.

“You are instructed that if from the evidence you find that defendant transported or participated with others in transporting or causing to be transported the automobile in question from Whiting, Indiana, to Santa Maria, California, knowing at the time that the automobile was stolen, you are to find the defendant guilty as charged.” [Rep. Tr. 128-129.]

It is submitted that the instructions as a whole provided the jury with a fair, understandable statement of the law applicable to the case.

Conclusion.

The conviction and judgment rest upon clear and substantial evidence, and the verdict of a properly instructed jury.

It is respectfully submitted that the judgment of the District Court should in all respects be affirmed.

Respectfully submitted,

JAMES M. CARTER,  
*United States Attorney;*

ERNEST A. TOLIN,  
*Chief Assistant U. S. Attorney,*  
*Attorneys for Appellee.*

No. 11732

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

J. W. MALONEY, Collector of Internal Revenue  
for the District of Oregon,

Appellant,

vs.

R. C. GLOVER, M. C. FINDLEY and TINKHAM  
GILBERT, Trustees under the Will of Sarah  
E. Carrier, deceased,

Appellees.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the District of Oregon



No. 11732

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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J. W. MALONEY, Collector of Internal Revenue  
for the District of Oregon,  
Appellant,

vs.

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Upon Appeal from the District Court of the United States  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS  
OF RECORD

HENRY L. HESS,  
VICTOR E. HARR,  
U. S. Courthouse,  
Portland, Oregon,

THOMAS R. WINTER,  
Smith-Tower Bldg.,  
Seattle, Washington,  
For Appellant.

REILLY & DAVIDSON,  
CARL E. DAVIDSON,  
CHARLES P. DUFFY,  
1525 Yeon Bldg.,  
Portland, Oregon,  
For Appellees.

In the District Court of the United States  
for the District of Oregon

Civil No. 3149

R. C. GLOVER, M. C. FINDLEY and TINKHAM  
GILBERT, Trustees Under the Will of  
SARAH E. CARRIER, Deceased,  
Plaintiffs,

vs.

J. W. MALONEY, Collector of Internal Revenue  
for the District of Oregon,  
Defendant.

## COMPLAINT

### I.

This is an action for the recovery of income taxes illegally collected from plaintiffs' predecessors in interest by defendant. Jurisdiction is based on Section 24 (5) of the Judicial Code of the United States, Title 28, Section 41, Subdivision 5, United States Code.

### II.

Plaintiffs are the trustees under the will of Sarah E. Carrier, who died on January 27, 1940. Defendant is the United States Collector of Internal Revenue for the District of Oregon.

### III.

The Last Will and Testament of the said Sarah E. Carrier, after providing for certain specific be-



quests, devised and bequeathed the residue and remainder of her estate to designated charitable, religious and educational organizations as follows: 5/20ths thereof directly to designated charitable, religious and educational organizations, and the remaining 15/20ths thereof to plaintiffs herein in trust for a period of ten years from the date of death of the testatrix. Plaintiffs were directed by paragraph fourteen of said will to safely invest the said 15/20ths of the residue and remainder of the estate and to use the income therefrom for the care and maintenance of such blood relatives of the testatrix and her deceased husband who in the judgment of the trustees were in need of financial assistance, if any there should be. The trustees were further directed to distribute the corpus and all unexpended interest and income to designated charitable, religious and educational organizations upon the expiration of the trust.

#### IV.

The administratrices of the estate, plaintiffs' predecessors in interest, filed income tax returns for the estate for the period from January 27, 1940, to December 31, 1940, and for the calendar year 1941, and erroneously paid to defendant the full amount of tax on all net income received by the estate during said periods without making the deductions authorized by Section 162 (a) of the Internal Revenue Code.

## V.

The Estate of said Sarah E. Carrier remained in the process of administration until March 30, 1943, when 15/20ths of the residue and remainder of the estate was transferred to plaintiffs herein as trustees aforesaid. No payments were made to said relatives during the course of administration of the estate.

## VI.

Defendant voluntarily refunded the tax upon 5/20ths of the income for each of said periods and thereafter plaintiffs filed claims for refund of \$3,410.20 for the period from January 27, 1940, to December 31, 1940, and \$3,519.69 for the calendar year 1941, which amounts represented the remaining 15/20ths of said tax payments. The said claims for refund were denied by the Commissioner of Internal Revenue by registered letter mailed to plaintiffs on April 15, 1946.

Wherefore, plaintiffs pray for judgment in the amount of \$6,929.89 with interest thereon from the dates of payment and for their costs and disbursements herein.

CARL E. DAVIDSON,  
CHARLES P. DUFFY,  
Attorneys for Plaintiffs.

[Endorsed]: Filed May 20, 1946.

[Title of District Court and Cause.]

ANSWER

The defendant, by his attorneys, Henry L. Hess, United States Attorney for the District of Oregon, and Victor E. Harr, Assistant United States Attorney, and for answer to the complaint on file herein states:

I.

The defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs I to VI inclusive, and therefore denies the same and the whole thereof.

Wherefore, defendant asks that the complaint herein be dismissed and that he have his costs and disbursements herein.

HENRY L. HESS,

United States Attorney.

/s/ VICTOR E. HARR,

Assistant United States Attorney.

State of Oregon,

County of Multnomah—ss.

Due service of the within Answer is hereby accepted at Portland, Oregon, this 19th day of July, 1946, by receiving a copy thereof duly certified to as such by Victor E. Harr, of attorneys for defendant.

/s/ REILLY & DAVIDSON,

Attorneys for Plaintiff.

[Endorsed]: Filed July 19, 1946.

[Title of District Court and Cause.]

### AMENDED ANSWER

The defendant by his attorney, Henry L. Hess, United States Attorney for the District of Oregon, for his amended answer to the complaint herein, respectfully alleges:

#### I.

That he admits the averments contained in paragraph I of the complaint, except that he denies that the taxes were illegally collected, and that he has no knowledge or information sufficient to form a belief as to the truth of the implication that the plaintiffs are the successors in interest to the parties who paid the taxes.

#### II.

That he admits the averments contained in paragraph II of the complaint, except that he has no knowledge or information sufficient to form a belief as to the truth of the averment that plaintiffs are the trustees under the will of Sarah E. Carrier.

#### III.

That he denies the averments contained in paragraph III of the complaint, except it is admitted that the property referred to in the paragraph is held under and subject to the terms and provisions of the last will and testament of Sarah E. Carrier, deceased.

IV.

That he denies the averments contained in paragraph IV of the complaint, except that he admits that income tax returns were filed for the periods specified; that the tax disclosed by the returns was paid; and that thereafter part of the tax paid was refunded.

Wherefore, defendant demands judgment dismissing the complaint together with the costs of this action.

/s/ HENRY L. HESS,  
United States Attorney.

/s/ VICTOR E. HARR,  
Assistant United States Attorney.

United States of America,  
District of Oregon—ss.

Due and legal service of the within Amended Answer is hereby accepted within the State and District of Oregon, on the 14th day of August, 1946, by receiving a copy thereof duly certified to as true and correct copy of the original by Victor E. Harr, Assistant United States Attorney for the District of Oregon.

/s/ CARL E. DAVIDSON,  
Attorneys for Plaintiffs.

[Endorsed]: Filed Aug. 14, 1947.



[Title of District Court and Cause.]

ORDER AUTHORIZING PLAINTIFFS TO  
SERVE AND FILE SUPPLEMENTAL  
COMPLAINT

The above matter coming on for hearing on this 23rd day of September, 1946, on plaintiffs' motion for leave to serve and file a supplemental complaint herein, plaintiffs appearing by Charles P. Duffy, one of their attorneys, and defendant appearing by Victor E. Harr, Assistant United States Attorney, one of his attorneys, and the Court having considered the motion and the stipulation between the parties hereto,

Now, Therefore, It Is Hereby Ordered that plaintiffs may serve and file a supplemental complaint herein to add their claim for the recovery of income taxes alleged to have been illegally collected from plaintiffs' predecessors in interest by defendant for the year 1942 in the amount of \$3,627.60, and

It Is Further Ordered that defendant's amended answer to the original complaint herein may serve as the answer to said supplemental complaint.

Dated at Portland, Oregon, this 23rd day of September, 1946.

CLAUDE McCOLLOCH,  
District Judge.

[Endorsed]: Filed Sept. 23, 1946.

[Title of District Court and Cause.]

## SUPPLEMENTAL COMPLAINT

### I.

The administratrices of the estate, plaintiffs' predecessors in interest, filed an income tax return for the estate for the calendar year 1942, and erroneously paid to defendant the full amount of tax on all net income received by the estate during said year without making the deductions authorized by Section 162 (a) of the Internal Revenue Code.

### II.

Defendant voluntarily refunded the tax upon 5/20ths of the income for the calendar year 1942 and thereafter plaintiffs filed a claim for refund of \$3,627.60, which amount represented part of the remaining 15/20ths of said tax payment. The said claim for refund was denied by the Commissioner of Internal Revenue by registered letter mailed to plaintiffs on August 29, 1946.

Wherefore, plaintiffs pray for judgment in the amount of \$3,627.60 with interest thereon from the date of payment and for their costs and disbursements herein, in addition to the relief prayed for in the original complaint herein.

CHARLES P. DUFFY,

Of Attorneys for Plaintiffs.

Due service of the within Supplemental Complaint is hereby acknowledged this 20th day of September, 1946, at Portland, Oregon.

/s/ VICTOR E. HARR,

Assistant United States Attorney,  
Attorneys/Solicitors for Defendant.

[Endorsed]: Filed Sept. 23, 1946.

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[Title of District Court and Cause.]

### PRE-TRIAL ORDER

This cause having come on regularly for pre-trial conference before the Honorable Claude McColloch, one of the Judges of the above-entitled Court, at Portland, Oregon, on the 25th day of November, 1946, plaintiffs R. C. Glover and Tinkham Gilbert appearing in person and all plaintiffs appearing by Carl E. Davidson and Charles P. Duffy, their attorneys, defendant appearing by Thomas R. Winter, Special Assistant to the Attorney General of the United States, the following proceedings were had and done:

### Admitted Facts

It appears from the pleadings and the pre-trial proceedings that the following facts are admitted and may be taken and deemed by the court on the trial as established facts therein:

## I.

That plaintiffs are the trustees under the will of Sarah E. Carrier, who died on January 27, 1940, and defendant is the United States Collector of Internal Revenue for the District of Oregon.

## II.

That the administratrices et al. of the estate of Sarah E. Carrier, plaintiffs' predecessors in interest, filed income tax returns for the estate for the period from January 27, 1940, to December 31, 1940, and for the calendar years 1941 and 1942, and paid to defendant the full amount of tax on all net income received by the estate during said periods.

## III.

That the estate of Sarah E. Carrier remained in the process of administration until March 30, 1943, when 15/20ths of the residue was transferred to plaintiffs herein as trustees in accordance with the terms of the said will.

## IV.

That none of the income received by the administratrices during the course of administration for the period covered by this action was from the sale of capital assets, and, therefore, "capital gains" are not involved herein.

## V.

That defendant voluntarily refunded the tax upon

5/20ths of the income for each of said periods and thereafter plaintiffs filed claims for refund of the amounts representing the remaining 15/20ths of the said tax payments; that thereafter said claims for refund were denied by the Commissioner of Internal Revenue by registered letters mailed to plaintiffs.

## VI.

That the organizations enumerated in paragraph fourteen of the said will are charitable and religious organizations within the purview of Sections 23 (o) and 162 (a) of the Internal Revenue Code of the United States.

### Plaintiffs' Contentions

#### I.

That under the provisions of paragraph fourteen of the will no payments were or could have been made to said relatives of the decedent during the course of administration of the estate.

#### II.

That the income received by the administratrices during the course of administration of the estate was permanently set aside for charitable purposes so as to allow the deductions authorized by Section 162 (a) of the Internal Revenue Code.

#### III.

That the income of the trust has been and will be so greatly in excess of claims that there is no



practical possibility that the unused annual income of the trust will ever be used for noncharitable purposes.

#### IV.

That the taxes in question were illegally collected from plaintiff's predecessors in interest by defendant by reason of the defendant's failure to allow the deductions authorized by Section 162 (a) of the Internal Revenue Code.

#### Defendant's Contentions

##### I.

The decedent did not "mandatorily" direct in her will that all of her estate should be distributed to the trustees of the trust described in paragraph Fourteenth (6) thereof but only the portion of her "general estate" which remained after its administration was completed and distributed in accordance with the laws of Oregon and the terms of her will. It is the ordinary income of the general estate of the decedent before any division or distribution thereof was made that is involved between the period January 27, 1940 (date of death), and March 30, 1943, and the income of the trust from March 30, 1943, to December 31, 1943.

None of the income in question is attributable to "capital gains" and there is no contention that the blood relatives of the decedent and her deceased husband would have been entitled to any.

## II.

By the terms of her will the decedent directed that 15/20ths of her "estate" which remained after the administration thereof was completed should be distributed to the trustees of the trust described in paragraph Fourteenth (6) to be held by them for a period of ten years from her death before any division or distribution of what might exist then of its assets and unused income should be made to the remainder beneficiaries. Neither a division nor a distribution amongst the remainder beneficiaries was authorized before the expiration of the ten-year period.

Pending the expiration of the ten-year period the trustees were required to "devote" all of the income (current and accumulated) derived from the 15/20ths portion of her estate "to the care and maintenance of such blood relatives of myself and of my deceased husband, the late Burton E. Carrier, not further removed than first cousins, who, in the judgment of said trustees are in need of financial assistance \* \* \*."

## III.

The Probate Court did not authorize the administratrices to set aside permanently any income of the estate for charitable purposes during the period it was in the course of administration and the trustees were not empowered to put the income of the trust beyond their power to use for the purpose stated in the will of the decedent during the years involved.

It would have been proper and necessary for the Probate Court to authorize the income of the estate to be devoted to the care of such of the blood relatives of the decedent and her deceased husband as needed care prior to the completion of the administration of the estate.

#### IV.

Neither the financial condition of the trust nor the needs of the blood relatives of the decedent and her deceased husband can be appraised nor estimated with reasonable accuracy throughout the period provided for the duration of the trust.

If the financial needs of the blood relatives, et cetera, require it, all of the income of the estate and the trust which the administratrices and the trustees are shown to have accumulated before January 27, 1950, must be devoted to their care and relief.

#### V.

The administratrices of the estate could not have defeated the income benefits provided for the blood relatives of the decedent and her deceased husband by merely keeping open the administration of the estate for the period of ten years. The rights of the blood relatives to the income were present throughout such years.

#### VI.

The taxes in question were determined correctly and assessed and collected according to law.

## Issues of Fact and Law to Be Determined

## I.

Whether the income received during the course of administration was permanently set aside for charitable purposes so as to authorize the deductions allowed by Section 162 (a) of the Internal Revenue Code.

## II.

Whether the income of the trust was so greatly in excess of claims as to exclude any practical possibility that the unused income would ever be used for noncharitable purposes.

## III.

Whether plaintiffs are entitled to a refund of the taxes paid as prayed for in the complaint and supplemental complaint herein.

## Exhibits

Certain exhibits were introduced in evidence by plaintiffs as pre-trial exhibits, the same being:

1. Copy of federal tax return for the Estate of Sarah E. Carrier, deceased, for the period from January 27, 1940, to December 31, 1940.
2. Copy of federal tax return for the Estate of Sarah E. Carrier, deceased, for the calendar year 1941.
3. Copy of federal tax return for the Estate of Sarah E. Carrier, deceased, for the calendar year 1942.

4. Copy of claim for refund covering period from January 27, 1940, to December 31, 1940.
5. Copy of claim for refund covering calendar year 1941.
6. Copy of supplementary claim for refund covering calendar year 1941.
7. Copy of claim for refund covering calendar year 1942.
8. Copy of supplementary claim for refund covering calendar year 1942.
9. Letter from Commissioner of Internal Revenue denying claims for 1940 and 1941.
10. Letter from Commissioner of Internal Revenue denying claims for 1942.
11. Certified copies of Will, Final Account, Supplemental Account, Order Approving Final Account and Directing Distribution, and Second Supplemental Account of Administratrices.
12. Certified copies of Report of Trustees and Decree in re Trustees v. Oregon Annual Conference Board of Education, Methodist Church.

It is agreed by the parties that this pre-trial order will govern the course of the trial and will not be amended except by consent or to prevent manifest injustice, and the Court finding that the



foregoing clearly and accurately reflects the pre-trial conference had herein and the stipulations and agreements of the parties, hereby ratifies and confirms the foregoing proceedings in all things and does hereby

Order that the said Pre-Trial Order be and the same is hereby incorporated into and hereby made a part of the record in this case for the purpose of controlling the course of proceedings on the formal trial hereof before the Court.

Done and dated this 6th day of January, 194....

CLAUDE McCOLLOCH,  
Judge.

Approved:

CARL E. DAVIDSON,  
Of Attorneys for Plaintiffs.

THOMAS R. WINTER,  
Of Attorneys for Defendant.

[Endorsed]: Filed Jan. 6, 1947.

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[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having come on regularly for trial without a jury before the Honorable Claude McCulloch, one of the Judges of the above-entitled

court, at Portland, Oregon, on the 6th day of January, 1947; plaintiffs R. C. Glover and Tinkham Gilbert appearing in person and all plaintiffs appearing by Carl E. Davidson and Charles P. Duffy, their attorneys; defendant appearing by Thomas R. Winter, Special Assistant to the Attorney General of the United States, and

The parties having produced testimony and evidence in behalf of their respective contentions as reflected by the pre-trial order previously made and entered herein, and

The court having thereafter considered fully all matters of fact and law presented by the parties and being at this time fully advised does make the following

### Findings of Fact

#### I.

That plaintiffs are the trustees under the Will of Sarah E. Carrier who died on January 27, 1940, and defendant is the United States Collector of Internal Revenue for the District of Oregon.

#### II.

The Last Will and Testament of the said Sarah E. Carrier, after providing for certain specific bequests, devised and bequeathed the residue and remainder of her estate to designated charitable, religious and educational organizations as follows: 5/20ths thereof directly to designated charitable, religious and educational organizations and the

remaining 15/20ths thereof to plaintiffs herein as trustees upon the following terms:

“\* \* \* to be held by them in trust for ten years after my decease, and safely invested by them and the income derived therefrom to be devoted to the care and maintenance of such blood relatives of myself and of my deceased husband, the late Burton E. Carrier, not farther removed than first cousins, who in the judgment of said trustees are in need of financial assistance, if any there should be, and in such sums as may seem wise to said trustees, it being my direction that the corpus of said trust fund be kept intact and such interest and income derived therefrom as is not used for the purposes above indicated to be added thereto and upon the expiration of said trust period of ten years after my decease said trustees divide all of the funds in their possession as such trustees, including the corpus of said trust fund and accumulated interest and income derived therefrom and not otherwise disposed of under the authority herein conferred, into four parts, of equal value, and execute such instruments as may be required by the laws of Oregon to transfer the same in equal portions to the following institutions,” (naming them)

### III.

That the administratrices c. t. a. of the estate of Sarah E. Carrier, plaintiffs' predecessors in inter-

est, filed income tax returns for the estate for the period from January 27, 1940, to December 31, 1940, and for the calendar years 1941 and 1942 and paid to defendant the full amount of tax on all net income received by the estate during said periods.

#### IV.

That the estate of Sarah E. Carrier remained in the process of administration until March 30, 1943, when 15/20ths of the residue was transferred to plaintiffs herein as trustees in accordance with the terms of the said will. No payments were made to said relatives during the course of administration of the estate.

#### V.

On March 15, 1941, the administratrices filed their income tax return for said estate for the period from January 27, 1940, through December 31, 1940, in which they disclosed that the estate had received net income during said period in the amount of \$25,356.42; on March 16, 1942, the administratrices filed their return for the year 1941 in which they disclosed that the estate of the decedent received net income during the calendar year of 1941 in the amount of \$21,784.04; on February 24, 1943, the administratrices filed their return for the year 1942 in which they disclosed that the estate of the decedent received net income during the calendar year 1942 in the amount of \$24,592.67.

## VI.

Defendant voluntarily refunded the tax upon 5/20ths of the income for each of said periods, and thereafter plaintiffs filed claims for refund of \$3,410.20 for the period from January 27, 1940, to December 31, 1940, \$3,519.69 for the calendar year 1941 and \$3,627.60 for the calendar year 1942, which amounts represented the remaining 15/20ths of said tax payments. The claims for refund were denied by the Commissioner of Internal Revenue by registered letters mailed to plaintiffs on April 15, 1946, and August 29, 1946.

## VII.

The organizations enumerated in paragraph fourteen of the said will are charitable and religious organizations within the purview of Section 23 (o) and 162 (a) of the Internal Revenue Code of the United States.

## VIII.

The testamentary trust was established on March 30, 1943, and the gross income, expenses and amounts paid to indigent relatives since that time have been as follows:

Period	Gross Income*	Expenses	Payments
3/31/43 to 12/31/43	\$21,536.02	\$2,100.00	\$ 675.00
1944	26,147.74	2,540.63	1,800.00
1945	23,101.16	1,438.86	1,800.00
1946	22,667.09	694.63	1,800.00
Totals.....	\$93,452.01	\$6,744.12	\$6,075.00

\*Includes the 5/20ths interest of the charitable organizations which received their shares directly. Their shares have been administered by the same trustees pursuant to an agreement between such organizations and the trustees to effect an orderly liquidation and disposition of the assets of the estate.



From the foregoing Findings of Fact the court draws the following

### Conclusions of Law

#### I.

That the income received by the administratrices during the course of administration of the estate was, pursuant to the terms of the will, permanently set aside for the purposes and in the manner specified in Section 23 (c) of the Internal Revenue Code of the United States.

#### II.

That the taxes in question were illegally collected from the plaintiffs' predecessors in interest by defendant by reason of the defendant's failure to allow the deductions authorized by Section 162 (a) of the Internal Revenue Code of the United States.

#### III.

That by reason of the foregoing plaintiffs are entitled to recover judgment against defendant for the sum of \$3,410.20, together with interest thereon at the rate of 6 per cent per annum from March 15, 1941; for the sum of \$3,519.69, together with interest thereon at the rate of 6 per cent per annum from March 16, 1942; for the sum of \$3,627.60, together with interest thereon at the rate of 6 per cent per annum from February 24, 1943, and for their costs and disbursements incurred herein.

Dated at Portland, Oregon, this 4th day of March, 1947.

CLAUDE McCOLLOCH,  
District Judge.

Due service of the within Findings of Fact and Conclusions of Law is hereby acknowledged this 3rd day of March, 1947, at Portland, Oregon.

/s/ J. ROBERT PATTERSON,  
Of Attorneys for Defendant.

[Endorsed]: Filed March 4, 1947.

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In the District Court of the United States  
for the District of Oregon

Civil No. 3149

R. C. GLOVER, M. C. FINDLEY and TINKHAM  
GILBERT, Trustees Under the Will of  
SARAH E. CARRIER, Deceased,  
Plaintiffs,

vs.

J. W. MALONEY, Collector of Internal Revenue  
for the District of Oregon,  
Defendant.

### JUDGMENT

This cause having come on regularly for trial without a jury before the Honorable Claude Mc-

Colloch, one of the Judges of the above-entitled court, at Portland, Oregon, on the 6th day of January, 1947; plaintiffs R. C. Glover and Tinkham Gilbert appearing in person and all plaintiffs appearing by Carl E. Davidson and Charles P. Duffy, their attorneys, defendant appearing by Thomas R. Winter, Special Assistant to the Attorney General of the United States, and

The parties having produced testimony and evidence in behalf of their respective contentions as reflected by the pre-trial order previously made and entered herein, and

The court having considered fully all matters of fact and law presented by the parties, and Findings of Fact and Conclusions of Law having been submitted by plaintiffs, which Findings of Facts and Conclusions of Law have heretofore been signed by the court and entered of record on the 4th day of March, 1947.

Now, Therefore, based upon the foregoing Findings of Fact and Conclusions of Law

It Is Hereby Considered, Ordered and Adjudged that plaintiffs have and recover judgment of and from defendant for the sum of \$3,410.20, together with interest thereon at the rate of 6 per cent per annum from March 15, 1941; for the sum of \$3,519.69, together with interest thereon at the rate of 6 per cent per annum from March 16, 1942; for the sum of \$3,627.60, together with interest thereon at the rate of 6 per cent per annum from

February 24, 1943, and for their costs and disbursements incurred therein.

Dated at Portland, Oregon, this 4th day of March, 1947.

CLAUDE McCOLLOCH,  
District Judge.

[Endorsed]: Filed March 4, 1947.

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[Title of District Court and Cause.]

#### NOTICE OF APPEAL

To: R. C. Glover, M. C. Findley and Tinkham Gilbert, Trustees under the Will of Sarah E. Carrier, Deceased, as above named and Carl E. Davidson and Charles P. Duffy, Attorneys for Plaintiffs:

You and each of you will please take notice that the Defendant J. W. Maloney, Collector of Internal Revenue for the District of Oregon, appeals to the Circuit Court of Appeals for the Ninth Circuit, from that certain Judgment in the above entitled cause, made and entered the 4th day of March, 1947, by the Honorable Claude McColloch, United States District Judge, wherein the Plaintiffs recovered a judgment for the sum of \$3,410.20, together with interest thereon at the rate of 6 per cent per annum from March 15, 1941; and for the sum of \$3,519.69, together with interest thereon at the rate of 6 per cent per annum from March 16,

1942; and for the sum of \$3,627.60 together with interest thereon at the rate of 6 per cent per annum from February 24, 1943, and for their costs and disbursements incurred therein under a suit for the recovery of income taxes illegally collected from Plaintiffs' predecessors in interest by the defendant.

HENRY L. HESS,

United States Attorney for the  
District of Oregon.

/s/ HERMAN H. HAHNER,

Assistant United States Attorney.  
Attorneys for Defendant.

United States of America,  
District of Oregon—ss.

I, Herman H. Hahner, Assistant United States Attorney for the District of Oregon, hereby certify that I have made service of the foregoing Notice of Appeal, on the within Plaintiff, by depositing in the United States Post Office, at Portland, Oregon, a duly certified copy thereof, enclosed in an envelope, with postage thereon prepaid, addressed to Reilly and Davidson, and Charles P. Duffy, 1525 Yeon Building, Portland, Oregon, Attorneys for Plaintiff.

/s/ HERMAN H. HAHNER,

Assistant United States Attorney.

[Endorsed]: Filed May 29, 1947.



[Title of District Court and Cause.]

ORDER

This Matter coming on to be heard ex parte this day upon motion of defendant, through his attorney, Henry L. Hess, United States Attorney for the District of Oregon, and Victor E. Harr, Assistant United States Attorney, for an order extending time for the filing of the record on appeal and docketing the within action in the Circuit Court of Appeals, for the reason that the Department of Justice has not had sufficient time to consider said appeal, and for the further reason that defendant has just ordered a transcript of the proceedings and testimony, and the Court being fully advised in the premises,

It Is Ordered that the time for filing the within appeal and docketing the action be, and it is hereby, extended to ninety days from the first date of the Notice of Appeal.

Made and entered at Portland, Oregon this 24th day of June, 1947.

CLAUDE McCOLLOCH,  
Judge.

[Endorsed]: Filed June 24, 1947.

United States Circuit Court of Appeals  
for the Ninth Circuit

R. C. GLOVER, M. C. FINDLEY and TINK-  
HAM GILBERT, Trustees Under the Will of  
SARAH E. CARRIER, Deceased,

Appellants,

vs.

J. W. MALONEY, Collector of Internal Revenue  
for the District of Oregon,

Appellee.

ORDER

This matter coming on to be heard this date upon motion of Appellee through his attorneys, Henry L. Hess, United States Attorney for the District of Oregon, and Victor E. Harr, Assistant United States Attorney, for an Order extending time for filing of the record and docketing the appeal in the within action for the reason that the Attorney General desires to consider the necessity and desirability of appealing this case, and the Court having considered said Motion and supporting Affidavit, and the Stipulation of the parties, and being advised in the premises,

It Is Ordered that the time for filing the record on appeal in the within action be, and it is hereby, extended thirty (30) days from and after August 27, 1947.

Made and entered at San Francisco, California, this 25th day of August, 1947.

FRANCIS A GARRECHT,

Judge.

A true copy, Aug. 26, 1947.

[Seal] Attest: Paul P. O'Brien.

[Endorsed]: Filed Aug. 26, 1947.

In the District Court of the United States  
for the District of Oregon

Civil No. 3149

R. C. GLOVER, M. C. FINDLEY and TINK-  
HAM GILBERT, Trustees Under the Will of  
SARAH E. CARRIER, Deceased,  
Plaintiffs,

vs.

J. W. MALONEY, Collector of Internal Revenue  
for the District of Oregon,  
Defendant.

ORDER TRANSMITTING ORIGINAL  
EXHIBITS

On Motion of the Defendant, and appellant,  
herein, and good cause appearing therefor, it is  
hereby ordered,

That all of the original exhibits in the above case  
be transmitted to the Circuit Court of Appeals, in  
connection with the appeal of this case.

Dated this 9th day of Sept., 1947.

CLAUDE McCOLLOCH,  
Judge.

Copy received: 9/9/47. Charles P. Duffy, of  
Attorneys for Plaintiffs.

[Endorsed]: Filed Sept. 9, 1947.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH  
DEFENDANT INTENDS TO RELY ON  
APPEAL

The defendant, having taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment rendered by the District Court for the District of Oregon, hereby designates the following points to be relied on in the prosecution of said appeal:

I.

That the District Court erred by holding that the income from the fifteen-twentieths of the residuum of the estate of Sarah E. Carrier, Deceased, was during the three years of administration permanently set aside for charitable institutions designated in Section 23 (o) of the Internal Revenue Code.

II.

That the District Court erred by holding that the income from fifteen-twentieths of the residuum of the estate was exempt from taxation under Section 162 (a) of the Internal Revenue Code.

III.

That the District Court erred in that portion of its findings of fact numbered VII, to wit, that the income of the trust has been and will be so greatly in excess of claims that there is no practical possibility that the unused annual income of the trust will ever be used for non-charitable purposes.

## IV.

That the District Court erred in that portion of its findings of fact numbered IX, to wit, that under the provisions of paragraph fourteen of the will of Sarah E. Carrier, Deceased, no payments could have been made to said relatives during the course of administration of the estate.

## V.

That the District Court erred in failing and refusing to order judgment for the defendant and against the plaintiff.

Dated this 9th day of Sept., 1947.

/s/ HENRY L. HESS,  
United States Attorney.

/s/ VICTOR E. HARR,  
Assistant United States Attorney.

/s/ THOMAS R. WINTER,  
Special Assistant to the United  
States Attorney.  
Attorneys for Defendant.

State of Oregon,  
County of Multnomah—ss.

Due service of the foregoing Statement of Points on Which Defendant Intends to Rely on Appeal to the United States Circuit Court of Appeals for the Ninth Circuit is hereby accepted at Portland, Oregon, this 9th day of Sept., 1947, by receiving



copy thereof, duly certified as such by Thomas R. Winter, of attorneys for the defendant.

/s/ CHARLES P. DUFFY,  
Of Counsel for Plaintiffs.

[Endorsed]: Filed Sept. 9, 1947.

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[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD  
ON APPEAL

To the Clerk of the Above-Entitled Court:

Defendant, J. W. Maloney, United States Collector of Internal Revenue for the District of Oregon, hereby designates the entire record in this case to be contained in the record on appeal, more particularly described as follows:

1. Complaint.
2. Answer.
3. Amended Answer.
4. Supplemental Complaint.
5. Order Authorizing Plaintiffs to Serve and File Supplemental Complaint.
6. Pre-Trial Order.
7. Transcript of proceedings of the pre-trial and trial on November 25, 1946, and January 6, 1947.
8. All exhibits.
9. Findings of Fact and Conclusions of Law.
10. Judgment.

11. Notice on Appeal.
12. Order Extending Time to Docket Record on Appeal.
13. Order (CCA-9) Extending Time to Docket Record on Appeal.
14. Order Transmitting Original Exhibits.
15. Statement of Points on which Defendant Intends to Rely on Appeal.
16. This Designation.

Dated this 9th day of Sept., 1947.

/s/ HENRY L. HESS,  
United States Attorney.

/s/ VICTOR E. HARR,  
Assistant United States Attorney.

/s/ THOMAS R. WINTER,  
Special Assistant to the United  
States Attorney.  
Attorneys for Defendant.

State of Oregon,  
County of Multnomah—ss.

Due service of the foregoing Designation of Contents of Record on Appeal to the United States Circuit Court of Appeals for the Ninth Circuit is hereby accepted at Portland, Oregon, this 9th day of September, 1947, by receiving copy thereof, duly certified as such by Thomas R. Winter, of Attorneys for the Defendant.

/s/ CHARLES P. DUFFY,  
Of Counsel for Plaintiffs.

[Endorsed]: Filed September 9, 1947.

[Title of District Court and Cause.]

DOCKET ENTRIES

1946

May 20—Filed complaint.

20—Issued summons—to marshal.

21—Filed affidavit of Charles P. Duffy.

21—Filed acceptance of service.

24—Filed summons with marshal's return.

July 19—Filed Answer of Deft.

Aug. 14—Filed amended answer of deft.

Sept. 10—Filed motion of pltffs. for order to serve  
and file supplemental complaint.

23—Filed stipulation for order allowing filing  
of supplemental complaint.

23—Filed and entered order allowing filing of  
supplemental complaint. McC.

23—Filed supplemental complaint.

Oct. 28—Entered order setting for pre-trial on  
Nov. 25, 1946. McC.

Nov. 25—Entered order resetting for trial on Jan.  
6, 1947—2 p.m. McC.

1947

Jan. 6—Filed and entered pre-trial order. McC.

6—Record of trial and order for ptff. to sub-  
mit brief in 15 days; deft. 30 days there-  
after and ptff's reply 15 days thereafter.  
Exhibits in file. McC.

20—Filed plaintiff's brief.

Feb. 20—Filed brief of defendant.

Mar. 4—Filed and entered Findings of Fact and  
Conclusion of Law. Notices. McC.

1947

4—Filed and entered Judgment for plaintiffs (see judgment) notices McC.

7—Filed cost bill of plaintiff.

May 29—Filed notice of appeal by defendant.

June 24—Filed and entered order extending time 90 days from notice of appeal to file and docketing appeal. McC.

July 7—Filed Transcript of Proceedings Nov. 25, 1946—Jan. 6, 1947.

Aug. 28—Filed copy order C.C.of A. extending time 30 days after Aug. 27, to appeal.

Sept. 9—Filed and entered order to send original exhibits to C.C.of A. McC.

9—Filed statement of points by defendant.

9—Filed designation of contents of record on appeal.

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### CLERK'S CERTIFICATE

United States of America,  
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 35 inclusive, constitute the transcript of record upon the appeal from a judgment of said Court in a cause therein numbered Civil 3149, in which J. W. Maloney, Collector of Internal Revenue for the District of Oregon is defendant and

appellant and R. C. Glover, M. C. Findley and Tinkham Gilbert, Trustees under the Will of Sarah E. Carrier, Deceased are plaintiffs and appellees; that said transcript has been prepared by me in accordance with the designation of contents of the record on appeal filed by the appellant and in accordance with the rules of Court; that I have compared the foregoing transcript with the original record thereof and that it is a full, true and correct transcript of the record and proceedings had in said Court in said cause, in accordance with the said designation, as the same appears of record and on file at my office and in my custody.

I further certify that I have enclosed a duplicate transcript of pre-trial and trial proceedings dated November 25, 1946 and January 6, 1947, and original exhibits 1 to 12 inclusive.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court in Portland, in said District, this 17th day of September, 1947.

[Seal]

LOWELL MUNDORFF,  
Clerk.

By /s/ F. L. BUCK,  
Chief Deputy.



In the District Court of the United States  
for the District of Oregon

Civil No. 3149

R. C. GLOVER, M. C. FINDLEY and TINKHAM  
GILBERT, Trustees Under the Will of  
SARAH E. CARRIER, Deceased,  
Plaintiffs,

vs.

J. W. MALONEY, Collector of Internal Revenue  
for the District of Oregon,  
Defendant.

Portland, Oregon, November 25, 1946.

Before: Honorable Claude McColloch,  
Judge.

Appearances:

Mr. Carl E. Davidson and Mr. W. C. Winslow,  
Attorneys for Plaintiffs.

Mr. Victor E. Harr, Assistant United States Attorney, and Mr. Thomas R. Winter, Special Assistant to the United States Attorney, Attorneys for the Defendant.

PROCEEDINGS OF PRE-TRIAL AND TRIAL

Mr. Davidson: Civil No. 3149, Glover, et al., vs. Maloney, involves a claim for refund of income taxes paid [1\*] by the Estate of Sarah E. Carrier, at Salem, Oregon, who died in January, 1940. Refund is claimed for the years 1940, 1941 and 1942.

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\* Page numbering appearing at top of page of Reporter's certified Transcript of Record.

Plaintiffs in this case have filed two claims. One claim was denied and the other claim was filed and denied after the complaint was filed in this case, and it has been pleaded by way of supplemental complaint and answer.

The question involved is whether or not the accumulated income of this estate of this decedent during the course of administration was or was not set aside for charitable uses. The Internal Revenue Code, Section 162 (a), provides for certain deductions where income is set aside for any charitable, religious or educational institution.

That arises in this manner: Decedent, after specific bequests, left the entire residue of the estate, 5/20ths thereof outright to the religious organizations. There is no question, I believe, as to that, although it is not admitted in the pleadings. The other 15/20ths was provided to be left to named trustees who are the plaintiffs herein. Under the terms of the will, these trustees were required to keep the residue, the 15/20ths, of the estate in trust for a period of ten years after decedent's death and to pay so much of the income as the trustees should determine to relatives of the decedent not further removed [2] than first cousins. During the period of the administration of the estate there were no claims made and no disbursements made.

At the termination of the estate, the entire residue so accumulated, the income thereof, was paid over to the trustees. The trustees then, in the years after this, received three claims of which two were allowed. I think it will appear that there were

thirty-seven different persons within this limitation of relationship. Two of the claims were allowed for \$75 a month each. The income of the estate during the course of administration and the trust thereafter has been many times the requirements for distributions or, disbursements, rather.

Our position is that there was no power in the executor during this period of administration to disburse anything and no power in the trustees because they could not receive the power until the estate was closed.

We furthermore contend, under well-recognized cases, that where, as a matter of fact, there is no reasonable possibility that the income which was not used during the year will be used for any private purposes, the income is really being accumulated for the charities, and at the end of the ten-year period the entire residue, with the accumulations, will go to the charities.

I might say, your Honor, that the will provides it shall be distributed only to indigent relatives. There was no distribution to relatives generally. The will used the words "relatives of myself and of my deceased husband, the late Burton E. Carrier, not farther removed than first cousins, who in the judgment of said trustees, are in need of financial assistance, if any there should be, and in such sums as may seem wise to said trustees," and so forth.

We have had around \$20,000 a year annual income from this estate. During the administra-

tion of the estate no one was paid. Since that time and up until very recently there was \$1800 a year, and now \$2400 a year paid to these two beneficiaries.

I think perhaps the position of the defendant is that where there is a possibility that some of this income may be used the accumulated income is not exempt, but I believe, under the cases, that is a question of fact.

Mr. Winter: There is one further question in this case, if the Court please. I have not received my exhibits. I don't know whether I will need them. I don't know whether counsel will have them or not, but I want to ask leave of the Court to put in the exhibits when they are received.

There is one further question in this case, and that is whether plaintiffs have any standing in court to maintain this action. Administratrix paid the taxes and they came out of the estate. We question the right of [4] plaintiffs to maintain this action to enforce their demand. Outside of that, I think counsel has stated the issues very clearly.

The Court: Is this case set for trial?

Mr. Winter: No, your Honor.

The Court: Will there be any testimony, other than documentary evidence?

Mr. Davidson: I believe we will require a little testimony.

The Court: Not very much?

Mr. Davidson: Not very much.

The Court: Is there anything you want to tell me that we do not already know about?

Mr. Winter: No, I think not, your Honor.

The Court: When will you have your papers and when will you be ready for trial? That is the main question. You say you do not have your papers?

Mr. Winter: Well, I have, up to the first of the year, but there are others I think I will require.

The Court: There is nothing more for me to do except to turn you gentlemen over to the Reporter for the purpose of identifying your documents, and then I can go on to other matters. Might we not agree on a trial date?

Mr. Winter: I would like it to go over until after the first of the year. [5]

Mr. Davidson: Any time is all right with us.

The Court: You state when.

Mr. Winter: We have a case set for January 6th. However, we expect we may be able to settle it.

The Court: How about the trial of this case then for that afternoon?

Mr. Winter: Monday, January 6th?

The Court: Yes, in the afternoon.

Mr. Davidson: At 2:00 o'clock?

The Court: Yes. Do you have some documents you want to identify?

Mr. Davidson: Yes, we have, your Honor.

(The following pre-trial exhibits were then marked and identified:)



## Plaintiffs' Pre-Trial Exhibits

## Exhibit

No.

Description

1. Copy of income tax return, Estate of Sarah E. Carrier, Deceased, for the year 1940.
2. Copy of income tax return, Estate of Sarah E. Carrier, for year 1941.
3. Copy of income tax return, Estate of Sarah E. Carrier, for year 1942.
4. Copy of claim for refund of tax illegally collected, Estate of Sarah E. Carrier, 1940.
5. Copy of claim for refund of tax illegally collected, Estate of Sarah E. Carrier, 1941.
6. Copy of claim for refund of tax illegally collected, Estate of Sarah E. Carrier, 1941.
7. Copy of claim for refund of tax illegally collected, Estate of Sarah E. Carrier, 1942.
8. Copy of supplemental claim for refund of tax illegally collected, Estate of Sarah E. Carrier, 1942.
9. Official denial of claims for 1940 and 1941—Letter dated April 15, 1946.
10. Official denial of claim for 1942—Letter dated August 29, 1946.
11. Certified copies of documents In the Matter of the Estate of Sarah E. Carrier, Deceased, including will, final account, supplemental account, order approving final account and distribution, etc.
12. Certified copies of decree authorizing action of the Trustees under the will, statements of Trustees for years 1945, 1944, 1943, etc.

Portland, Oregon, January 6, 1947.

### PROCEEDINGS OF TRIAL

Mr. Davidson: If the Court please, we have agreed on a pre-trial order.

The Court: Very well.

Mr. Davidson: And at this time I believe counsel for the defendant is willing to stipulate the admission of the exhibits marked at the pre-trial conference.

Mr. Winter: Yes, your Honor.

The Court: Admitted.

(Copy of income tax return, Estate of Sarah E. Carrier, Deceased, for the year 1940, thereupon received in evidence and marked Plaintiffs' Exhibit No. 1.)

(Copy of income tax return, Estate of Sarah E. Carrier, Deceased, for the year 1941, thereupon received in evidence and marked Plaintiffs' Exhibit No. 2.)

(Copy of income tax return, Estate of Sarah E. Carrier, Deceased, for the year 1942, thereupon received in evidence and marked Plaintiffs' Exhibit No. 3.)

(Copy of claim for refund of tax illegally collected, Estate of Sarah E. Carrier, Deceased, 1940, thereupon received in evidenced and marked Plaintiffs' Exhibit No. 4.)

(Copy of claim for refund of tax illegally collected, Estate of Sarah E. Carrier, Deceased, 1941, thereupon received in evidence and marked Plaintiffs' Exhibit No. 5.)

(Copy of claim for refund of tax illegally collected, Estate of Sarah E. Carrier, Deceased, 1941, thereupon received in evidence and marked Plaintiffs' Exhibit No. 6.)

(Copy of claim for refund of tax illegally collected, Estate of Sarah E. Carrier, Deceased, 1942, thereupon received in evidence and marked Plaintiffs' Exhibit No. 7.)

(Copy of supplemental claim for refund of tax illegally collected, Estate of Sarah E. Carrier, Deceased, 1942, thereupon received in evidence and marked Plaintiffs' Exhibit No. 8.)

(Official denial of claims for 1940 and 1941—Letter dated April 15, 1946, thereupon received in evidence and marked Plaintiffs' Exhibit No. 9.)

(Official denial of claim for 1942—Letter dated August 29, 1946, thereupon received in evidence and marked Plaintiffs' Exhibit No. 10.)

(Certified copies of documents In the Matter of the Estate of Sarah E. Carrier, Deceased, including will, final account, supplemental account, order approving final account and distribution, etc., thereupon received in evidence and marked Plaintiffs' Exhibit No. 11.)

(Certified copies of decree authorizing action of the Trustees under the will, statements of Trustees for years 1945, 1944, 1943, etc., thereupon received in evidence and marked Plaintiffs' Exhibit No. 12.)

Mr. Davidson: I might mention briefly the points in this case again. This is a suit for the refund of certain income tax paid by the Estate of Sarah E. Carrier, Deceased, of Salem, Oregon. By the will of Mrs. Carrier she left 5/20ths of the residue to designated charities; the other 15/20ths, by the terms of her will, to be paid to three [10] named Trustees. Under the terms of her will she directed that the trust be continued for ten years after her death and that so much of the income as the Trustees determine to be necessary be paid to certain relatives of herself and her deceased husband, within a certain degree of relationship.

Her death was in January, 1940; the estate was in the course of administration for approximately two years, and at the end of that time this trust was paid over to these Trustees, who received applications from three relatives, and they granted the applications of two of them.

As we understand the Internal Revenue laws, any income of an estate which is paid or permanently set aside for charitable beneficiaries is deductible. Our contention is that all the income was permanently set aside, because no part of it could be used for any private beneficiary.



It is further our contention that if that position is not legally sound, there could be no payment of that income, legally, during the course of administration. In any event, the income of the estate was so much and the claim, potential and actual, were so small that it was practically certain at the end of each year that any income not expended that year for the beneficiaries would never be required to be paid because the subsequent income would be sufficient to take care of them. [11]

I assume your Honor would like to have, and I know we would like to file, a memorandum of our authorities and argument, rather than to argue it orally.

Mr. Winter: This is practically a question of law. I do not think there is going to be any dispute about the facts. It is a question of the construction of the will. Our contentions are set forth on pages 3, 4 and 5 of the pre-trial order. Plaintiffs' contentions are set forth—— Did you finish?

Mr. Davidson: Yes.

Mr. Winter: Plaintiffs' contentions are set forth on page 3. Of course, we contend that the decedent did not mandatorily direct in her will that all of the estate be distributed to these relatives but that she specifically directed that so much of the income, as necessary, should be used by the Trustees in the support of any of her relatives within a certain degree of relationship.

I think we have all the exhibits which will set forth the contentions of the parties, except I do not think we have any copy of the estate tax return in



the case. I think we should have a copy of that tax return and the final determination on that. I wonder if counsel would consent for me to file a certified or photostatic copy of the estate tax return and the deficiency notice, which will show all the facts. [12]

Mr. Davidson: I haven't any objection to it being in there, but I think Mr. Glover, who was attorney for the estate, should be entitled to make any explanation in connection with that that seems necessary.

Mr. Winter: That is satisfactory.

Mr. Davidson: We do not have it here.

Mr. Winter: I thought that was in until I started looking over the exhibits this morning. However, we may be able to get the information from the witnesses, but I would like to reserve the right to ask leave a little later on to supply that.

Mr. Davidson: Very well.

---

### RONALD C. GLOVER

was thereupon produced as a witness on behalf of plaintiffs and, being first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Davidson:

Q. Your name is Ronald C. Glover?

A. Yes.

Q. What is your business or profession?

A. Attorney-at-law.

(Testimony of Ronald C. Glover.)

Q. Where do you reside?

A. Salem, Oregon.

Q. Did you have any relationship with Sarah E. Carrier [13] during her life?

A. Yes, for many years before her death.

Q. You were her attorney? A. I was.

Q. Were you the attorney handling the probate of her estate? A. I was.

Q. Was there any other attorney associated with you on the probate? A. No.

Q. You handled that alone? A. Yes.

Q. You are also one of the plaintiffs, one of the Trustees under the Will of Sarah E. Carrier?

A. I am.

Q. And you are so acting at the present time?

A. I am.

Q. And have been since the trust was set up?

A. Yes, sir.

Q. Mr. Glover, were there any claims filed by any relatives of Mrs. Carrier during the course of the probate of the estate? A. There were.

Q. What disposition was made of them?

A. Two of them——

Q. I mean, during the course of probate? [14]

A. During the course of probate? There were no claims filed during the course of probate.

Q. Were there any inquiries during the course of probate as to rights they might have?

A. A number of them.

Q. What disposition was made of those inquiries?

A. They were informally advised during the

(Testimony of Ronald C. Glover.)

course of probate that the matter of allocation of any funds to any claimant was not up for consideration; that had to await the formation of the trust.

Q. Were all of the beneficiaries of Sarah E. Carrier notified of the provisions of her will?

A. They were all sent a copy of the will.

Q. Up to the present time, how many applications for assistance have there been under the provisions of the will?      A. Three.

Q. Will you say who those applicants were? State who those applicants were and what disposition was made of their claims?

A. Two of them were allowed. One of them was Ellen Bell and the other one was Mrs. Royce, relatives of Mrs. Carrier, one on each side of the family. The third application was not finally acted upon. As I recall, he did not finally conclude his application.

Q. So that those two have been the only ones allowed? [15]      A. Yes.

Q. Have you had notice that there are any prospective applications?

A. None that I know of, and I think not.

Q. How much was allowed by the Trustees upon each of these applications that were allowed?

A. \$75, originally, each month, and in the last two or three months—I forget just how many—that was increased to \$100 per month.

Q. That would be \$1800 annually, the original allocation for the two, and that has been increased to \$2400 annually, at this time?

A. That is correct.

(Testimony of Ronald C. Glover.)

Q. At the conclusion of the probate, under the terms of the will, 5/20ths was directed to be paid outright to charities and 15/20ths to comprise this trust. Will you explain how that was handled upon closing of the estate?

A. When the estate was closed—there was nothing disposed of during the course of administration in the way of property. There was an accumulation, as I recall, of something like \$42,000 of funds.

All of the assets, as listed in the inventory and appraisement, except some personal property that was sold under authority of the Court and report made, such as personal effects and furnishings and things of that character, [16] were all turned over to the Trust, and two of the Trustees named in the will had died—one of them had died and then there was an alternative Trustee named and he had also died, and two of the Trustees, Dr. Findley and myself, agreed upon Mr. Tinkham Gilbert as the third Trustee.

Mr. Winslow was hired to set up the trust. The trust was set up and the funds in the hands of the Administratrix and the property belonging to the estate was turned over to these Trustees under the terms of the will.

Under the terms of the will, furthermore, 5/20ths went to certain religious organizations named as beneficiaries; the other 15/20ths under the terms of the will was to be held in trust for a period of ten years after the date of her death. The trust was organized on that basis.

(Testimony of Ronald C. Glover.)

Q. How do you handle the accounting of the trust as between the testamentary trust and the Court trust?

A. The testamentary trust, or these 15/20ths, is held in trust and investments are made from time to time of moneys received from the sale of the trust property that has been sold under directions of the Circuit Court, and that money is re-invested when it comes in and as accumulations of funds are received, 5/20ths is turned over to the boards representing these various religious organizations. That is under agreement between them and their representatives and the Trustees of the testamentary trust. [17]

Q. The entire residue, then, has been administered as a single unit but, as the income has come in, it has been distributed to what you call the testamentary trust, or the charities' trust, out of the Court trust?

A. That is right, when we accumulate from ten to twenty thousand dollars, then we have a distribution, not at certain periods of the year, but that is dependent upon when our accumulations get large enough to warrant it.

Q. When did the Trustees take over the property from the estate?

A. I believe it was along about June or July, I forget when, of 1942. I think it might have been March.

Q. March, 1942?



(Testimony of Ronald C. Glover.)

A. Yes. It was about two years—she died January 27, 1940, and I think it was a little over two years after her death.

Mr. Winslow: 1943 is right.

Mr. Davidson: That is all.

Cross-Examination

By Mr. Winter:

Q. You say you have had three applications of blood relatives for assistance?

A. That is right.

Q. When did they file their first application, if you recall, approximately? [18]

A. Shortly after the trust was formed. Miss Bell, who is one of the beneficiaries, was in straitened circumstances during the period of the estate and some inquiry had been had from that family, and, as soon as the trust was formed, I believe it was probably the first one and, shortly after its formation——

Q. The trust was formed about March, 1943, was it not?

A. Well, I am not sure of the year.

Q. March 30, 1943, I think was the date.

A. That is when the estate was closed.

Q. Yes. Shortly after that it was formed?

A. That is right.

Q. When did you receive the second application?

A. Shortly after that. The two were pending on letters during the course of the administration.

(Testimony of Ronald C. Glover.)

Q. Application had been made prior to the closing?

A. Not a formal application. In determining the eligibility of persons who might be expected to receive something, we formulated a questionnaire—the Trustees did—and sent that to them and we required a very formal application and corroboration and also a medical examination.

Q. But you say they had written letters during the course of the administration, about seeking relief?

A. Not so much to me as to the Administratrices. They, the Administratrices, were nieces of Mrs. Carter, and they were [19] all related to these folks, and they visited back and forth and wrote back and forth.

Q. About how much have you paid out of the income of the trust to blood relatives?

A. Just the two.

Q. I mean, approximately how much have they been paid, do you recall?

A. Well, I suppose \$1800 to each of them. That would be \$3600 for the first year and the same the second year and, just recently, we have been paying out—it would be \$2400.

Q. You have no applications now in addition to those?

A. No. That would be \$900 for the year and twice that would be \$1800, instead of \$3600, and then the last should be \$1200 and twice that or \$2400, on that basis. That is all that has been expended.

(Testimony of Ronald C. Glover.)

Q. Did you prepare the estate tax return for the estate?       A. I did.

Q. Do you recall if the return was filed about April 4, 1941?

A. I filed it within the eight months period, I think. You mean the state tax?

Q. The estate tax, the Federal Estate Tax.

A. The Federal Estate Tax was filed later. I filed the State of Oregon state tax first. That was within the eight months period, so as to get the discount, and the other one [20] was within the fifteen months period of the date of death.

Q. Then, that was about April 4, 1941?

A. Probably so.

Q. You recall that the gross estate value, the value of the gross estate was about \$334,000?

A. It was something like that.

Q. Of which \$266,000 was claimed as having been bequeathed to charity?       A. Yes.

Q. That is about the figure, isn't it?

A. I believe so.

Q. \$266,240.26.

A. The Federal people jumped that up.

Q. I was coming to that.       A. Pardon me.

Q. Subsequently, the value of the net estate was increased by the investigating officer by the value of the blood relatives' rights to income, was it not?

A. I don't recall that particular phase of it. I do recall—what I do recall is that the largest asset of the estate was the Meadow River Lumber Company, I believe 1839 shares originally, and there

(Testimony of Ronald C. Glover.)

was some Federal decision in the courts—I believe West Virginia, a West Virginia case—that is where this stock is located, where the corporation is located, in West Virginia. We had passed it through the state court [21] at \$100 per share, or par, and this decision placed the valuation at 107½, and there was insistence on the part of the Federal representatives that that be marked up to 107½.

Q. Don't you recall that the value of the net estate was increased by deducting the value of the rights of the blood relatives to the income under Paragraph 14 of the will? Wasn't there some adjustment made in that?

A. I believe there was. I believe Mr. Harold Hall, who was the representative of the Government handling that matter, had some decision on the matter.

Q. And that deficiency was \$6,000?

A. I am not sure that it was based on that. I think that \$6,000, it seems to me, also included upping of the——

Q. Both things together?

A. Yes, all of them together. These lumber company holdings went in through the state at \$28,500 and they insisted on forcing those to \$42,000, and then there was the Bradford Supply Company and they insisted on a higher valuation for that.

Q. You did not file a petition with the Tax Court to review the determination?

A. No, we didn't.

(Testimony of Ronald C. Glover.)

Q. Did you file a claim for refund of the additional tax?

A. I don't believe we did, during the course of administration. [22]

Mr. Winter: That is all.

A. I went quite fully into the matters of the income tax matters and the estate matters with the representatives of the Government. Mr. Carroll Williams was the income tax man at Salem. He had quite a bunch of decisions before him and he seemed very fair about it, and then Mr. Harold Hall——

Mr. Winter: That is all.

Mr. Davidson: That is all.

(Witness excused.)

---

### TINKHAM GILBERT

was thereupon produced as a witness on behalf of plaintiffs and, being first sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Davidson:

Q. Mr. Gilbert, you are one of the plaintiffs in this case and one of the Trustees under the Will of Sarah E. Carrier, Deceased, I believe?

A. Yes.

Q. Do you handle the accounting for the Trust?

A. Yes.



(Testimony of Tinkham Gilbert.)

Q. Have you done so since it was set up? [23]

A. Yes.

Q. Will you state from your records the amount of money and what other property was received by the Trust from the Estate?

A. The Estate received in cash——

Q. The Trust received in cash?

A. The Trust received in cash, that is right, \$42,542.99 and it received the other properties which were never reduced to a money amount.

Q. You did not attempt to set the other properties up on your books at any particular amount?

A. No. When it was stocks, we just said so many shares, and if there were notes we set them up at the face of the notes without attempting to evaluate them.

Q. How was that cash which was received by the Estate set up on the books?

A. It was set up as a part of the corpus of the Estate.

Q. Mr. Glover explained this arrangement. That figure you gave there was for both the 15/20ths and the 5/20ths? A. That is right.

Q. When did you make your first accounting for the income of the Trust?

A. At the end of the year 1943.

Q. 1943? A. Yes. [24]

Q. That would cover, then, the period from March 30, 1943, to the end of the year?

A. Yes.

(Testimony of Tinkham Gilbert.)

Q. Will you state what the income of the Trust was in that year?

Mr. Winter: We will object to that. I do not see the materiality.

Mr. Davidson: I believe, your Honor, it is material upon the question of whether or not there was any invasion of the accumulated income during that period.

The Court: He may answer, subject to the objection.

(Question read.)

A. The income was \$21,536.02.

Q. (By Mr. Davidson): Is that the net income? A. There were some expenses.

Q. How much were the expenses, including distribution beneficiaries?

A. We paid some of this income tax which is here in question which had not been paid——

Q. Yes.

A. \$2,108.89, and our expenses other than that were \$2,100.

Q. And the income was \$21,536.02?

A. Yes.

Q. How much was paid to blood-relative beneficiaries in that year? [25] A. \$675.

Q. Will you give the same figures for the year 1944?

A. For 1944 the income was \$26,147.74.

Q. And the expenses?

A. The expenses were \$2,540.63.

(Testimony of Tinkham Gilbert.)

Q. And the distribution to blood-relative beneficiaries? A. It should have been \$1,800.

Q. That would have been \$1,800 to these two, \$900 each? A. Yes, that is right, \$1,800.

Q. Do you have the figures for the year 1945?

A. Yes, for 1945 the income was \$23,101.16; payments to relatives, again, \$1,800.

Q. Have you completed your report for the year 1946?

Mr. Winter: I did not get the expenses.

Q. (By Mr. Davidson): Did you give the expenses for 1945?

A. Total expenses for 1945, \$1,486.68.

Q. Will you state, for 1945, what the nature of these expenses was?

A. \$977.23 were expenses in relation to handling the assets. For instance, in the sale of a piece of real estate we had the commission to pay and some title and other expenses.

Q. How much were the Trustees' fees for that year? A. The Trustees' fees are \$900 a year.

Q. \$900?

A. That is for all three Trustees, \$300 each. However, the [26] Trustees' fees are not charged to this fund.

Q. They are not charged to this fund?

A. No.

Q. Before we get to that, do you have your figures for 1946? A. Yes.

Q. Can you tell us what they are?

(Testimony of Tinkham Gilbert.)

A. For 1946—I just have them in the rough here—the total income is \$22,667.09; total expenses, \$694.63.

Q. Now, those figures that you have been giving for 1943, 1944, 1945 and 1946 are income from the Trust which comprises the entire residue and of which the testamentary Trust is only three-quarters? A. That is right.

Q. The distributions that you stated to the blood relatives, of course, came out of the testamentary Trust, to the extent of their share? A. Yes.

Q. The Trustees' fees, as I understand, are \$900 a year and charged against the testamentary Trust after its funds are taken out of this court Trust which comprises the entire residue?

A. That is right.

Q. Are there any other expenses in connection with the testamentary Trust?

A. Attorneys' fees. [27]

Q. Can you tell me how much those have run each year?

A. I can look here. We paid no attorneys' fees in 1943. 1944, we paid a total of \$1,625, which included some fees to the attorneys representing the Trustees and some fees to attorneys representing the beneficiaries of this Trust. In 1945—this is before the testamentary Trust I speak of—

Q. That is right.

A. —attorneys' fees, \$125 and, in 1946, \$300.

Q. Has the interest of the 5/20ths in the residuary Trust, that is in the court Trust, has that been

(Testimony of Tinkham Gilbert.)

reduced by capital distribution; in other words, has that 5/20ths maintained clear up to the present time, or has that been reduced because of distributions to the charities entitled to their 5/20ths?

A. From time to time as we had funds available, we made distributions.

Q. Did they get some principal along with the distribution?

A. Whatever cash—they got whatever cash we had and as we liquidated the principal and turned it into cash, we paid them, regardless of whether it came from principal or income.

Q. You distributed this money from the court Trust to the charities on account of their 5/20ths and the other was put into the account for the testamentary Trust, of which you are one of the Trustees? [28]      A. Yes.

Q. How frequently did you make a division of funds?

A. When money was coming in quite actively, we generally waited until we had around \$20,000, and then we divided it up into twentieths—a thousand dollars for each twentieth. At times when we had \$10,000—the distribution depended on the amount of money available.

Q. Have you figures which will show the amount of investments by the Trustees of the moneys received by them as income from the court Trust?

A. Yes. You want to know what?

Q. Is it very detailed?

A. It is not very detailed, no.



(Testimony of Tinkham Gilbert.)

Q. You might give us the dates and amounts that have been invested for the testamentary Trust?

A. During 1944 we purchased \$82,500 of Series G United States Bonds and \$15,000 of 2 per cent coupon bonds.

Q. That was in 1944?                      A. Yes.

Mr. Winter: Does my objection go to all of this testimony for 1943 and 1944?

The Court: It is so understood.

Mr. Winter: I do not want to interrupt.

A. During 1945 we purchased \$50,000 of 2 per cent coupon bonds and during 1946 we have just purchased \$190,000 of 2 per cent [29] coupon bonds.

We paid some premium on those bonds.

Q. (By Mr. Davidson): That is close enough.

A. The amount of money would not be that, exactly.

Q. This investment in 1944 of \$97,500, that consisted of approximately \$40,000 in cash, plus the income and principal received in the meantime?

A. Yes.

Q. Do you keep any cash on hand at all times?

A. We keep cash available, yes. At the end of 1944 we had \$6,028.43 in this fund.

Q. How did you treat, on your books, these additional securities as they were acquired? How did you set them up on your books?

A. We set them up at cost, as corpus of the Trust, that is, the testamentary Trust.

Mr. Davidson: That is all.

(Testimony of Tinkham Gilbert.)

Cross-Examination

By Mr. Winter:

Q. Do I understand you received \$42,542.99 in cash when the Trust was set up?

A. I am not sure that I have here that figure—\$42,582.99.

Q. Then you said you received what else?

A. Various assets.

Q. Yes.

A. Consisting of real estate and corporate stocks.

Q. Amounting to how much?

A. I don't have any totals.

Q. Didn't you give us the total a few minutes ago?

A. No. We never set any valuation on any of these assets just mentioned. For instance, the stock was listed at so many shares and real estate was just a piece of real estate.

Q. You have been liquidating some of the real estate?

A. Yes. All of the real estate is now liquidated except one contract which is not completely paid.

Q. When you acquire a good deal of cash you distribute it to the 4/5ths interest?

A. 5/20ths.

Q. 5/20ths interest? A. Yes.

Q. And you hold the residue, less what you expend for expenses until the end of the ten-year period, is that your contention? A. Yes.

(Testimony of Tinkham Gilbert.)

Q. Of course, you do not know what the relatives, the immediate blood relatives, might need in the future, do you?

A. No, we have no way of knowing; just estimate that.

Q. Did you have anything to do with the preparation of the Estate tax return? A. No.

Q. You said in 1943 the Trustees paid some \$2100 on income [31] tax? A. Yes.

Q. Was that on the income tax of the income to the Estate? A. Yes.

Q. In other words, when they closed the Estate they just transferred everything they had in the Estate, no matter where they received it from, no matter whether it was income received during the administration or not, is that right?

A. That is right.

Mr. Winter: I think that is all.

(Witness excused.)

Mr. Davidson: That completes the plaintiffs' case.

Mr. Winter: I think, your Honor, we can stipulate, in the event the Court decides adversely to the Government, we will have the amount computed by the Department and the dates of payment, so that there will be no question about it, rather than taking the time of the Court to put in the dates of payment. They have alleged that they paid the tax and we have admitted that it was paid. It is just a question of dates when it was paid.

In the United States Circuit Court of Appeals  
for the Ninth Circuit

No. 11732

J. W. MALONEY, Collector of Internal Revenue  
for the District of Oregon,

Appellant,

vs.

R. C. GLOVER, M. C. FINDLEY and TINKHAM  
GILBERT, Trustees under the Will of Sarah  
E. Carrier, deceased,

Appellees.

APPELLANT'S STATEMENT OF POINTS ON  
WHICH HE INTENDS TO RELY ON AP-  
PEAL AND DESIGNATION OF RECORD  
FOR PRINTING

Comes now J. W. Maloney, Collector of Internal Revenue for the District of Oregon, appellant above named, and for his statement of points upon which he intends to rely on this appeal adopts the statement of points filed by him in the District Court in connection with his Notice of Appeal and included in the transcript of record prepared and certified by the Clerk of such District Court at page 30 thereof; and appellant designates the entire transcript of record, as prepared and certified by the

Clerk of said District Court, as necessary for the consideration of this appeal.

Dated this 9th day of Sept., 1947.

/s/ HENRY L. HESS,  
United States Attorney.

/s/ VICTOR E. HARR,  
Assistant United States Attorney.

/s/ THOMAS R. WINTER,  
Special Assistant to the United  
States Attorney.  
Attorneys for Appellant.

State of Oregon,  
County of Multnomah—ss.

Due service of the foregoing Appellant's Statement of Points on Which He Intends to Rely on Appeal and Designation of Record for Printing to the United States Circuit Court of Appeals for the Ninth Circuit is hereby accepted at Portland, Oregon, this 9th day of Sept., 1947, by receiving copy thereof, duly certified as such by Thomas R. Winter, of attorneys for the appellant.

/s/ CHARLES P. DUFFY,  
Of Attorneys for Appellees.

[Endorsed]: Filed Oct. 3, 1947.



[Title of Circuit Court of Appeals and Cause.]

# STIPULATION RE PRINTING OF RECORD

It is hereby stipulated by and between the appellant, by his attorneys, Henry L. Hess, United States Attorney for the District of Oregon, Victor E. Harr, Assistant United States Attorney, and Thomas R. Winter, Special Assistant to the United States Attorney, and the appellees, by their attorneys, Carl E. Davidson and Charles P. Duffy, that, subject to the discretion of the Court, the exhibits in this case, having been filed and docketed in their original form with the above-entitled Court and while necessary for the consideration of this appeal, need not be printed since they will be available to the Court for inspection and are not, for the most part, susceptible for printing.

Dated this 26th day of Sept., 1947.

/s/ HENRY L. HESS,

United States Attorney.

/s/ VICTOR E. HARR,

Assistant United States Attorney.

/s/ THOMAS R. WINTER,

Special Assistant to the United States Attorney.

Attorneys for Appellant.

/s/ CARL E. DAVIDSON,

/s/ CHARLES P. DUFFY,

Attorneys for Appellees.

So ordered:

/s/ WILLIAM DENMAN,

Senior United States Circuit Judge.

No. 11732

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In the United States  
**Circuit Court of Appeals**  
for the Ninth Circuit

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J. W. MALONEY, Collector of Internal Revenue  
for the District of Oregon,

Appellant,

v.

R. C. GLOVER, M. C. FINDLEY and TINKHAM  
GILBERT, Trustees under the Will of Sarah E.  
Carrier, Deceased,

Appellees.

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On Appeal from the District Court of the United States  
for the District of Oregon

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**Brief for the Appellant**

---

THERON LAMAR CAUDLE,  
*Assistant Attorney General.*

HELEN R. CARLOSS,

ROBERT N. ANDERSON,

MELVA M. GRANEY,

*Special Assistants to the  
Attorney General.*

HENRY L. HESS,  
*United States Attorney.*

THOMAS R. WINTER,  
*Special Assistant to the  
Chief Counsel.*

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FILE

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In the United States  
**Circuit Court of Appeals**  
for the Ninth Circuit

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**No. 11732**

J. W. MALONEY, Collector of Internal Revenue  
for the District of Oregon,  
Appellant,

v.

R. C. GLOVER, M. C. FINDLEY and TINKHAM  
GILBERT, Trustees under the Will of Sarah E.  
Carrier, Deceased,  
Appellees.

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On Appeal from the District Court of the United States  
for the District of Oregon

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**Brief for the Appellant**

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OPINION BELOW

The District Court rendered no formal opinion. It entered findings of fact and conclusions of law (R. 18-24) which are not reported.

JURISDICTION

This appeal involves claims for refund of income tax for the taxable years 1940 to 1942, inclusive, in the total amount

of \$10,557.49. (R. 24-26.) A claim for refund for each of the taxable years was filed within three years after the filing of the returns for those years (See Exhibits 1-5, inclusive, and 7)<sup>1</sup> in accordance with the requirements of Section 322(b)(1) of the Internal Revenue Code. The claims for refund were disallowed by the Commissioner by registered letters mailed to appellees on April 15, 1946, and August 29, 1946. (R. 22.) Suit was filed in the District Court May 20, 1946 (R. 35), in conformity with Section 3772 of the Internal Revenue Code. The District Court had jurisdiction of the case under Section 24, Fifth, of the Judicial Code. The judgment of the District Court was entered March 4, 1947. (R. 24-26.) Notice of appeal was filed on May 29, 1947 (R. 26-27), conformably to the provisions of Section 128(a) of the Judicial Code, as amended, upon which the jurisdiction of this Court rests.

### QUESTION PRESENTED

Whether 15/20ths of the income received by the administratrices during the course of the administration of the estate of Sarah E. Carrier, deceased, is exempt from income taxation under Section 162(a) of the Internal Revenue Code as income which was permanently set aside for charitable,

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<sup>1</sup> Pursuant to agreement of the parties (R. 70), the exhibits introduced in evidence (See R. 44-46) have been filed and docketed with this Court in their original form and are not contained in the printed record.

etc., purposes under the last will and testament of the decedent.

## STATUTES AND REGULATIONS INVOLVED

### Internal Revenue Code:

#### SEC. 161. IMPOSITION OF TAX.

(a) Application of Tax.—The taxes imposed by this chapter upon individuals shall apply to the income of estates or of any kind of property held in trust, including—\* \* \*

(b) Computation and Payment.—The tax shall be computed upon the net income of the estate or trust and shall be paid by the fiduciary, \* \* \*  
(26 U.S.C. 1940 ed., Sec. 161.)

#### SEC. 162. NET INCOME.

The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

(a) There shall be allowed as a deduction (in lieu of the deduction for charitable, etc., contributions authorized by section 23(o)) any part of the gross income, without limitation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in section 23(o), or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for \* \* \*;

\* \* \*

(26 U.S.C. 1940 ed., Sec. 162.)

Treasury Regulations 103, promulgated under the Internal Revenue Code:

SEC. 19.162-1. *Income of estates and trusts.*—In ascertaining the tax liability of the estate of a deceased person or of a trust, there is deductible from the gross income, subject to exceptions, the same deductions which are allowed to individual taxpayers. \* \* \*

From the gross income of the estate or trust there are also deductible (either in lieu of, or in addition to, the deductions referred to in the preceding paragraph of this section) the following:

(1) Any part of the gross income of the estate or trust for its taxable year which, by the terms of the will or of the instrument creating the trust, is paid or permanently set aside during such year for the charitable, etc., uses or purposes referred to or described in section 162(a). This deduction is in lieu of that authorized by section 23(o) in the case of individual taxpayers.

\* \* \*

Treasury Regulations 111, Section 19.162-1, is identical.

## STATEMENT

The findings of fact of the District Court (R. 19-22), taken principally from admitted facts (R. 10-12), are as follows:

Sarah E. Carrier, hereinafter called the "decedent," died

on January 27, 1940. (R. 19.) In her last will and testament she provided for certain specific bequests and in paragraph Fourteenth devised and bequeathed the residue of her estate to designated charitable, religious and educational organizations as follows (R. 19-20): 5/20ths directly to designated charitable, religious and educational organizations and the remaining 15/20ths to appellees herein as trustees upon the following terms (R. 20):

\* \* \* to be held by them in trust for ten years after my decease, and safely invested by them and the income derived therefrom to be devoted to the care and maintenance of such blood relatives of myself and of my deceased husband, the late Burton E. Carrier, not farther removed than first cousins, who in the judgment of said trustees are in need of financial assistance, if any there should be, and in such sums as may seem wise to said trustees, it being my direction that the corpus of said trust fund be kept intact and such interest and income derived therefrom as is not used for the purposes above indicated to be added thereto and upon the expiration of said trust period of ten years after my decease said trustees divide all of the funds in their possession as such trustees, including the corpus of said trust fund and accumulated interest and income derived therefrom and not otherwise disposed of under the authority herein conferred, into four parts, of equal value, and execute such instruments as may be required by the laws of Oregon to transfer the same in equal portions to the following institutions, (naming them).

The organizations named in the above-quoted paragraph



are charitable and religious organizations within the purview of Sections 23(o) and 162(a) of the Internal Revenue Code. (R. 12, 22.)

The estate of the decedent remained in the process of administration until March 30, 1943, during which time no payments were made to relatives under paragraph Fourteenth of the decedent's will. (R. 21.) On March 30, 1943, the administratrices transferred 15/20ths of the residue of the estate to appellees as trustees, in accordance with the provisions of paragraph Fourteenth of the will. (R. 11, 21.)

During the period when the estate was in the process of administration, the administratrices filed income tax returns for the estate, reporting and paying tax on net income of \$25,356.42 for the period from January 27, 1940, through December 31, 1940; \$21,784.04 for the calendar year 1941; and \$24,592.67 for the calendar year 1942. (R. 21.) None of this income was from the sale of capital assets. (R. 11.)

The Collector voluntarily refunded the tax on 5/20ths of the income for each of these periods and claims for refund of the remaining 15/20ths of the tax for each year were subsequently filed by appellees. (R. 22.) The claims for refund, which were disallowed (R. 22), were based on assertions that the entire income of the estate was accumulated during the taxable periods and became a part of the residue bequeathed to charitable, etc., organizations under

paragraph Fourteenth of the decedent's will and that, therefore, the income was deductible as having been permanently set aside during the taxable periods for the purposes specified in Section 23(o) of the Internal Revenue Code (See Exhibits 4-7, inclusive).

The gross income, expenses and amounts paid to indigent relatives since the establishment of the trust on March 30, 1943, after the taxable periods involved here, were as follows (R. 22):

Period	Gross Income*	Expenses	Payments
3/31/43 to 12/31/43	\$21,536.02	\$2,100.00	\$ 675.00
1944	26,147.74	2,540.63	1,800.00
1945	23,101.16	1,438.86	1,800.00
1946	22,667.09	694.63	1,800.00
Totals.....	\$93,452.01	\$6,744.12	\$6,075.00

\*Includes the 5/20ths interest of the charitable organizations which received their shares directly. Their shares have been administered by the same trustees pursuant to an agreement between such organizations and the trustees to effect an orderly liquidation and disposition of the assets of the estate.

On the basis of these facts, the District Court held that the income received by the administratrices during the course of the administration of the estate was, pursuant to the terms of the decedent's will, permanently set aside for the purposes and in the manner specified in Section 23(o) of the Internal Revenue Code and therefore is exempt from taxation under Section 162(a) of the Code. (R. 23.)

## STATEMENT OF POINTS TO BE URGED

The statement of points upon which we intended to rely is set forth in the Record at pages 31-32. (See also, R. 68-69.) Points III and IV may be ignored. They refer to findings of fact of the District Court which were contained in the copy we received of the findings of fact and conclusions of law of the District Court but are crossed out in the copy contained in the typewritten transcript of record and are omitted from the printed record, having apparently been deleted by the District Court before signature. Briefly, we contend that the District Court erred in holding that 15/20ths of the income received by the administratrices of the estate of Sarah E. Carrier, deceased, during the course of administration of the estate was, pursuant to the terms of the will of the testatrix, permanently set aside for charitable, etc., purposes and therefore exempt from income taxation under Section 162(a) of the Internal Revenue Code.

## SUMMARY OF ARGUMENT

Section 162(a) of the Internal Revenue Code exempts from tax income which, pursuant to the will or deed creating the trust, is permanently set aside for charitable, etc., purposes. In paragraph Fourteenth of her will, Sarah E. Carrier, deceased, devised and bequeathed 15/20ths of the residue of her estate in trust for a period of ten years after

her decease, with directions to devote the income therefrom to the care and maintenance of needy blood relatives of herself and husband, no farther removed than first cousins, and, at the end of the ten-year trust term, to transfer the corpus and accumulated income to named organizations which are admittedly charitable and religious organizations within the coverage of Section 162(a). The District Court held that the income received by the administratrices during the course of the administration of the estate and prior to establishment of this trust was permanently set aside for charitable, etc., purposes and therefore exempt from tax under Section 162(a). This holding is sustainable only on the theory that the income received by the administratrices during the course of the administration of the estate became a part of the corpus of the trust subsequently established, since only the corpus of the trust, which was to be kept intact during the trust period, was permanently set aside for charitable, etc., purposes. If the income received by the administratrices remained income available to the trustees for distribution as such to needy relatives of the testatrix, the income was subject to noncharitable uses and therefore not permanently set aside for charitable uses.

It is the law in Oregon, the State in which this trust was administered, that, unless otherwise provided in the testator's will, the income beneficiaries of a testamentary trust are entitled to income from the date of the testator's death. In

the case of a testamentary trust of the residuary estate, as here, it is the income from the residue as subsequently ascertained which is distributable retroactively by the trustees as income. This includes income received during the course of the administration of the estate provided that, as in the present case, the income received during the course of the administration of the estate was derived from property which later passed to the trustees as residue of the estate. This rule that the income received during the administration of an estate remains income available for disposition as income under the terms of the testamentary trust, instead of becoming a part of the corpus of the trust, is one which attempts to effectuate the testator's intent and which, in accordance with the testator's presumed or apparent intent, treats a testamentary trust as if it had been set up immediately upon the testator's death, with a corpus of residue to be subsequently ascertained.

There can be no doubt that the instant testatrix intended that the income received by the administratrices during the course of the administration of the estate should remain income available for payments to needy relatives, rather than to become part of the trust corpus. In paragraph Fourteenth of her will she provided for a trust term of *ten years after her decease* and it was the income during that period, which of course includes the period when the estate was in the



process of administration, which was to be distributable to needy relatives.

It is immaterial whether payments could have been made to needy relatives during the course of the administration of the estate. Section 162(a) allows a deduction only of income *permanently* set aside for charitable, etc., purposes *during the taxable year* and the income received by the administratrices was, during the taxable years, subject to future use by the trustees, and probably also to present application under court order, for payments to needy relatives. The income received by the administratrices also remained subject to use for payments to needy relatives up until the expiration of the ten-year trust term, for the testatrix merely provided that at the end of the ten-year period the accumulated income and corpus were to be transferred to the designated charities. She did not provide that unused annual income should be added to corpus.

It is also immaterial that the income of the trust may have been greatly in excess of the claims or needs of relatives. The income of the taxable years was subject to use for payments to needy relatives and the possibility that some or all of it would be so used was not so remote as to be negligible. Under such circumstances the income was not permanently set aside for charitable, etc., purposes during the taxable years and appellees are not entitled to the deduction the District Court has allowed them.

## ARGUMENT

The income in question was not permanently set aside for charitable, etc., purposes under the last will and testament of Sarah E. Carrier, deceased, and therefore is not exempt from income taxation under section 162(a) of the Internal Revenue Code.

In paragraph Fourteenth of her will, Sarah E. Carrier, deceased, devised and bequeathed 15/20ths of the residue and remainder of her estate to appellees as trustees for a period of ten years after her decease, with directions to devote the income therefrom to the care and maintenance of needy blood relatives of herself and her husband, not farther removed than first cousins, and, at the end of the ten-year trust period, to transfer the corpus and any accumulated interest and income derived therefrom to named organizations which are admittedly charitable and religious organizations within the coverage of Section 162(a) of the Internal Revenue Code, *supra*. From January 27, 1940, when the testatrix died, to December 31, 1942, during which period the estate of the testatrix was in the process of administration and the trust had not been established, the administratrices received income which appellees contend and the District Court has held is exempt from income taxation under Section 162(a) of the Internal Revenue Code as having been permanently set aside for charitable, etc., purposes by virtue of the above-stated provisions of

paragraph Fourteenth of the testatrix's will. The District Court did not state the reason or reasons for its holding, but from any point of view the holding is, we submit, clearly erroneous.

The deduction allowed by Section 162(a) is of income which "pursuant to the terms of the will or deed creating the trust," is during the taxable year paid or permanently set aside for charitable, etc., purposes. The terms of the will of the testatrix therefore control in determining the status of income asserted to be exempt from tax under the statute, irrespective of what was actually done with the income. *Bank of America Nat. T. & Sav. Ass'n v. Commissioner*, 126 F. 2d 48, 52 (C.C.A. 9th); *Commissioner v. Citizens & So. Nat. Bank*, 147 F. 2d 977, 980-981 (C.C.A. 5th); *Charles P. Moorman Home for Women v. United States*, 42 F. 2d 257 (W.D. Ky.); cf. *Ithaca Trust Co. v. United States*, 279 U. S. 151. Accordingly, the purpose for which the income involved in the present case was actually used is immaterial (*Bank of America Nat. T. & Sav. Ass'n v. Commissioner, supra*), as is also the manner in which the income was treated on the books of the administratrices and trustees (*Charles P. Moorman Home for Women v. United States, supra*).<sup>2</sup>

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2. Tinkham Gilbert, one of the trustee-appellees herein, testified that the cash received from the administratrices was set up as part of the corpus of the estate on the trustees' books. (R. 58.) It may also be that some of the income of the estate was used to pay debts and legacies, for the trustees received some \$42,000 in cash from the administratrices (R. 51, 58), whereas the total net income reported for the taxable periods by the administratrices was \$71,733.13 (R. 21).

In addition, to meet the requirements of Section 162(a), the income received by the administratrices of the testatrix's estate must be income which, pursuant to the will of the testatrix, is "permanently" set aside, or is to be used "exclusively", for charitable, etc., purposes. It is well established that income is not permanently set aside for charitable, etc., purposes within the meaning of Section 162(a) if under the will, there is a possibility of use of the income for other than a charitable, etc., purpose, at least when the possibility of use for another purpose is not so remote as to be negligible. *Merchants Bank v. Commissioner*, 320 U. S. 256, 263; *Bank of America Nat. T. & Sav. Ass'n v. Commissioner*, *supra*; *Langenbach's Estate v. Commissioner*, 134 F. 2d 590 (C.C.A. 6th); *Commissioner v. Upjohn's Estate*, 124 F. 2d 73 (C.C.A. 6th); *Commissioner v. F. G. Bonfils Trust*, 115 F. 2d 788 (C.C.A. 10th); *Boston Safe Deposit & T. Co. v. Commissioner*, 66 F. 2d 179 (C.C.A. 1st), certiorari denied, 290 U. S. 700; *Charles P. Moorman Home for Women v. United States*, *supra*; *Holcombe v. United States*, 41 F. Supp. 471 (Mass.); *Colt v. Duggan*, 25 F. Supp. 268 (S.D.N.Y.).

In the present case 15/20ths of the income received by the administratrices was subject to other than charitable, etc., uses unless, by the terms of the testatrix's will, that income passed to the trustees from the administratrices as a part of the *corpus* of the trust for which provision was made in



paragraph Fourteenth of the will. The testatrix did not direct that the income from 15/20ths of the residue of her estate be set aside for charitable, etc., organizations. On the contrary, she directed that the income from 15/20ths of the residue of her estate be devoted to the care and maintenance of blood relatives of herself and her husband, no farther removed than first cousins, who should be in need of financial assistance and it was only the income which was not used for such a purpose and was "not otherwise disposed of under the authority herein conferred" which was to be transferred to charitable, etc., organizations, along with the corpus of the trust, at the expiration of the ten-year trust period. (R. 20.) The testatrix also evidently intended that all expenses of the administration of the trust should be paid from the income of 15/20ths of her residuary estate, for she stated that it was her "direction that the corpus of said trust fund be kept intact." (R. 20.) Only the corpus of the trust, which was to be kept intact by the trustees and transferred to designated charitable, etc., organizations at the end of the ten-year trust period, was dedicated exclusively to and permanently set aside for charitable, etc., purposes. If the income involved here—that received by the administratrices during the course of the administration of the estate prior to the establishment of the trust—remained income when and if transferred to the trustees after the taxable years, and thus did not become part of the corpus



of the trust, that income could be used for the financial assistance of needy relatives of testatrix and her husband and, accordingly, was not permanently set aside for charitable, etc., purposes or to be used exclusively for such purposes.

As this Court stated in *Commissioner v. Bishop Trust Co.*, 136 F. 2d 390, 391:

Whether the money here in question was received by the trustee as income or as corpus depends upon the effect of the language of the will under the law of the jurisdiction in which the estate is administered. \* \* \*

Here, the testatrix's estate was administered in the State of Oregon (See Exhibit 11) and, accordingly, Oregon law is controlling.

The law of Oregon in this connection is clear. In *Kinney v. Uglow*, 163 Or. 539, the testator, Abel Uglow, provided in his will that, as soon as his estate was administered upon, the whole of his estate exclusive of a bequest made to his wife, should be turned over to a trustee who was directed to make specified monthly payments to members of the testator's family. The executor received income during the administration of the estate and before the trust was created and, upon completion of the administration of the estate but before the trustee was appointed, made distributions of the income to the beneficiaries of the trust in amounts which

covered monthly payments for prior months. The question was whether the executor should have turned over this money to the trust instead of paying it out to the beneficiaries. The court held that the income was properly paid out to the beneficiaries, stating (pp. 553-555):

The general rule is well established that when property is devised or bequeathed in trust to pay the income therefrom to a beneficiary for life or for a limited time, such beneficiary is entitled to payment of the income *from the death of the testator*, unless otherwise provided in the will: \* \* \*

The reason for the above rule, as often expressed, is that the life tenant ranks first in the consideration of the testator, and a contrary construction would take from him a part of his income and add it to the corpus of the estate, thereby at the expense of the life tenant increasing the estate of the remaindermen.

\* \* \*

The fact that the testator devised and bequeathed the residue of his estate to John C. Uglow as trustee, with direction to him to pay the income therefrom to designated beneficiaries, does not alter the general rule hereinabove stated that such income shall accrue to the beneficiaries *as of the date of the testator's death*, rather than the date of the delivery of his estate to the trustee: \* \* \*. [Italics supplied.]

The general rule stated and applied by the court in this case was reiterated in *In re Feebely's Estate*, 170 P. 2d 757 (Or. 1946), and stated to apply in that case. The rule is

one which is applicable in numerous jurisdictions (see, e. g., *Hale v. Anglim*, 140 F. 2d 235 (C.C.A. 9th); *Commissioner v. Bishop Trust Co.*, *supra*; *Harrison v. Commissioner*, 119 F. 2d 963 (C.C.A. 7th); 1 (Restatement of the Law, Trusts, Sec. 234) and which, as in Oregon (*Kinney v. Uglow*, *supra*), applies when the testamentary trust consists of the testator's residuary estate (See 70 A.L.R. 637-644, note; 158 A.L.R. 443-447, note). Under the rule, the trustee should not add income received by the executor to the corpus of the trust. 4 Bogert, Trusts and Trustees, Sec. 811, p. 2342.

*In re Feehely's Estate*, *supra*, may at first blush appear to be, but is not, in conflict with the rule as stated in *Kinney v. Uglow*, *supra*. In *In re Feehely's Estate*, also decided by the Supreme Court of Oregon, the testator made specific bequests of all of her assets, except a parcel of real property, and devised and bequeathed the residue of her estate (consisting of the parcel of real property) in trust with directions to the trustees to pay the income therefrom for the support, maintenance and education of her daughter Suzanne. The parcel of real property, which was income producing property, produced \$5,000 in income during the administration of the estate before the payment of claims against the estate. The question was whether the property should be sold in order to obtain money to pay the claims against the estate or whether the \$5,000 in income could be used for that purpose. It was held that the \$5,000 con-

stituted a part of the residue of the testator's estate and was available for payment of the claims but this holding resulted from the fact that, as the court pointed out, most of the \$5,000 was earned by assets which would not have remained a part of the residue of the estate had those assets (that is, the income producing property) been sold promptly to provide money with which to pay the claims against the estate. That the court did not intend to depart from the rule stated in *Kinney v. Uglow*, *supra*, is uncontravertible in view of the fact that the rule was quoted from *Kinney v. Uglow*, and stated to apply. The explanation for the result reached is that under the rule it is the income from the residue *as subsequently ascertained* which is available for distribution as income under the terms of the trust (*Commissioner v. Bishop Trust Co.*, *supra*; 158 A.L.R. 443, note) and in *In re Feehely's Estate*, *supra*, the income involved was from property which would not have been residue of the estate, and thus not corpus of the trust, if the income had not been held to be available for payment of claims. The choice in that case was as between the adoption of the so-called "Massachusetts" rule and the general rule as to income from *property of the estate sold to pay debts, claims, etc.* In adopting the general rule and holding that such income becomes a part of the residue of the estate, the decision applies the rule that the income received by the executor from the residue *as subsequently ascertained* is dis-

tributable by the trustees as income in accordance with the terms of the trust.

The rule that the income from the residue as subsequently ascertained remains income distributable as such by the trustees and does not become a part of the trust corpus may apply even though in distributing the trust income trustees are required to exercise a discretion based upon a specified external standard, as in the present case, and are not, as in the usual case applying the rule, merely directed to pay the income to a designated person or persons for life or for a stated term of years. In *In re Feehely's Estate*, *supra*, where the Supreme Court of Oregon stated that the rule applied, trust income was to be paid for the support, maintenance and education of the testatrix's daughter and any income not needed for those purposes was, in the discretion of the trustee, to be accumulated and held for the account of the daughter. In *Hewitt v. Hicock*, 96 Conn. 176, one of the cases which the Oregon Supreme Court cited in *Kinney v. Uglow*, *supra*, as authority for the rule (p. 554), it was stated (96 Conn. at pp. 179-180):

In the cases cited, the right of the life tenant to receive the income from the trustees was absolute. In this case it is not. During the minority of any beneficiary the trustees are to expend such portion of the income as may seem necessary to provide such beneficiary with a comfortable support and to enable him or her to secure a good education. After any beneficiary becomes



of age, he or she is not entitled to receive his or her share of the income absolutely, unless it appears to the trustees that such beneficiary is capable of managing and applying it. And any portion of the income not used in any year is to become a part of the principal.

The claim made on behalf of the possible remaindermen is that in consequence of these conditions in the will, and because the trustees did not qualify until May 17th, 1920, all of the interest accrued up to that date had become "income unused in any year" and must be added to principal.

With this contention we do not agree. \* \* \*

The cases cited, and the manifest intention of the testatrix, required us to hold that the fund in question had not lost its character as income when it came into the hands of the trustees in 1920, \* \* \* *On this branch of the case our conclusion is that the trustees are required to treat the fund as income in their hands, and to deal with it as part of the income of the first fiscal year of the trust.* [Italics supplied.]

As indicated in *Hewitt v. Hicock, supra*, the rule stems from an attempt to effectuate the presumed or apparent intent of the testator. This the Supreme Court of Oregon recognized when, in applying the rule in *Kinney v. Uglow, supra*, it stated (p. 553):

*In construing wills the first duty of the court is to ascertain, if possible, the intention of the testator. Taking the present will in its entirety, it is evident that Abel Uglow intended that the provisions thereof as to payment of income from the estate to the beneficiaries*

named should be effective as of the date of his death and not the date of delivery of the estate to the trustee.

\* \* \* *There is no indication in the will that the income received by the executor shall become a part of the corpus of the trust estate*, except that such surplus as may remain after paying the allowances provided in paragraph IV of the will is to be added to the trust estate. [Italics supplied.]

There can be little, if any, doubt that in the present case the testatrix intended that 15/20ths of the income received by the administratrices from her residuary estate was to remain income, available for payments to needy blood relatives, rather than to become part of the corpus of the trust set aside for named charitable, etc., organizations. In paragraph Fourteenth of her will the testatrix stated that 15/20ths of the residue of her estate was to be held by appellees in trust "for ten years *after my decease*" [italics supplied] and provided for disposition of the corpus and accumulated income "upon the expiration of said trust period of ten years after my decease." (R. 20.) Obviously, therefore, she assumed that the trust would be set up immediately upon her death and intended that the income from 15/20ths of her residuary estate should be available for disposition as income to needy relatives for a period *beginning at her death* and ending ten years later. Indeed, only by considering the income received by the *administratrices* as income distributable to needy relatives could the income

from 15/20ths of the testatrix's residuary estate be distributed as income for a ten-year period. Plainly, therefore, as in *Commissioner v. Bishop Trust Co.*, *supra*, p. 391, decided by this Court, "the trustee was entitled to income from the date of the testator's death."

The income to which the trustees were entitled as income available for distribution to needy relatives included all of the income received by the administratrices during the taxable period involved here, when the estate was in the process of administration. R. C. Glover, who handled the probate of the estate and, as one of the trustees, is an appellee in this case (R. 49), testified before the District Court as follows (R. 51):

A. When the estate was closed—there was nothing disposed of during the course of administration in the way of property. There was an accumulation, as I recall, of something like \$42,000 of funds.

All of the assets, as listed in the inventory and appraisement, except some personal property that was sold under authority of the Court and report made, such as personal effects and furnishings and things of that character, were all turned over to the Trust, \* \* \*

Hence, all of the income received by the administratrices during their administration of the estate must have been income from property the administratrices subsequently turned over to the trustees as residue of the estate and which,

as such, became the corpus of the trust. In any event, appellees, who were the plaintiffs in the District Court seeking a refund of tax, failed to prove that any part of the net income during the taxable period was derived from property which did not constitute residue turned over to the trustees.

Contrary to the contention appellees made in the District Court (See R. 12, 40), it is immaterial whether any of this income could have been paid to needy relatives during the course of the administration of the estate and prior to establishment of the trust. Actually, it would appear that claims of needy relatives would have been allowed by a state court during the administration of the estate if any such claims had been pressed, so long as it appeared that the administrators had on hand income which would later pass to the trustees as income.<sup>3</sup> See *Kinney v. Uglow, supra*; *Reid v. Dodge*, 44 App. D. C. 558. But even if none of the income received by the administratrices could have been paid out to needy relatives during the taxable period, when the testatrix's estate was in the process of administration, the income was nevertheless not permanently set aside during the taxable years as required by Section 162(a), because the

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3 R. C. Glover, one of the appellees, testified that the relatives filed no claims during the course of probate; that during the course of probate a number of them inquired as to their rights; and that they were informally advised that the matter of allocation of any funds to any claimant had to await the formation of the trust. (R. 49-50.)

income was at that time subject to future use by the trustees for payments to needy relatives and thus for noncharitable purposes. See *Charles P. Moorman Home for Women v. United States*, *supra*; *Commissioner v. Upjohn's Estate* *supra*. In the very first year after the trust was created the trustees could use the income received by the administratrices for payments to relatives. See *Hewitt v. Hicock*, *supra*. Moreover, the income the administratrices received remained subject to use for payments to needy relatives during the entire period of the trust, for the testatrix did not direct that the unused income of any year was to be added to the corpus. Instead, she directed that at the expiration of the trust the corpus and "accumulated interest and income" (R. 20) should be transferred to the designated charities. She must therefore have intended that unused income was to be accumulated as income, as appellees seem to have conceded in the District Court (See R. 39-41), and to give to the charities only that which remained at the expiration of the trust.

Appellees will probably contend, as they did in the District Court (R. 12-13, 40), that, because of the large amount of income earned by the trust, there was no real possibility that the unused income of any given year would be used for other than charitable, etc., purposes. We are, however, here concerned with income received by the administratrices which was subject to later use by the trustees for payments



to needy relatives, not with income which the trustees did not use in any particular year of the trust for payments to needy relatives. There was a very real possibility that the income received by the administratrices during the course of the administration of the estate would be used for payments to needy relatives immediately upon establishment of the trust and certainly at least a possibility that that income, if not used in the first year of the trust, would be used in subsequent years for payments to needy relatives.<sup>4</sup> Whether the income of the taxable years, instead of income subsequently earned, was actually used by the trustees for payments to needy relatives is immaterial. Since the income of the taxable years was during those years subject to at least future use, in the option of the trustees, for payments to needy relatives, the income was not permanently set aside for charitable, etc., purposes during the taxable years. *Bank of America Nat. T. & Sav. Ass'n v. Commissioner*, 126 F. 2d 48, 51 (C.C.A. 9th). The right to a deduction under Section 162(a) depends upon the effect of the testatrix's will, not on what the trustees choose to do. Appellee's contention in this connection is apparently based upon cases holding that income was permanently set aside for charitable, etc., purposes in situations where, pursuant to the testator's will, the possibility that the income would be used

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<sup>4</sup> Tinkham Gilbert, one of the trustee-appellees herein, testified that the trustees had no way of knowing what the relatives might need in the future. (R. 65.)

for other than charitable, etc., purposes was so remote as to be negligible. Obviously, we do not have such a situation here.

## CONCLUSION

The decision of the District Court is incorrect and should be reversed.

Respectfully submitted,

THERON LAMAR CAUDLE,  
*Assistant Attorney General.*

HELEN R. CARLOSS,

ROBERT N. ANDERSON,

MELVA M. GRANEY,

*Special Assistants to the  
Attorney General.*

HENRY L. HESS,

*United States Attorney.*

THOMAS R. WINTER,

*Special Assistant to the  
Chief Counsel.*

November, 1947.



No. 11733

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United States  
Circuit Court of Appeals

For the Ninth Circuit.

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UNITED STATES OF AMERICA,  
Appellant,  
vs.  
J. H. GALLAGHER, J. IRA McNUTT and  
EARL L. McNUTT,  
Appellees.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the District of Oregon

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS  
OF RECORD

HENRY L. HESS,  
EDWARD B. TWINING,  
V. E. HARR,

United States Court House,  
Portland, Oregon,

For Appellant.

JAMES C. DEZENDORF,

800 Pacific Bldg.,  
Portland, Oregon,

For Appellees.



In the District Court of the United States  
for the District of Oregon

Civil No. 3242

J. H. GALLAGHER, J. IRA McNUTT and  
EARL L. McNUTT,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

## COMPLAINT

### I.

This action arises under the Act of March 3, 1887, c. 359, Sections 1, 2, 24 Stat. 505, as amended; U.S.C., Title 28, Sections 41(20) and 250(1), commonly known as the Tucker Act, as hereinafter more fully appears.

### II.

Plaintiff J. H. Gallagher resides in the City of Corvallis, Benton County, Oregon; Plaintiffs J. Ira McNutt and Earl L. McNutt reside in the City of Eugene, Lane County, Oregon.

### III.

The nature of Plaintiffs' claim is upon a contract, implied in fact, with the Government of the United States for a reasonable and fair market value of the use of a certain road belonging to Plaintiffs, which was used by authorized officers and agents of the United States with knowledge of Plaintiffs' ownership thereof.

## IV.

The facts upon which this claim is based are as follows:

(a) On or about April 11, 1942, Plaintiff J. H. Gallagher entered into an agreement in writing with Crown Zellerbach Corporation, a copy of which agreement is hereto attached, marked Exhibit "A", whereby said [1\*] Crown Zellerbach Corporation granted to Plaintiff J. H. Gallagher the right, for the period beginning April 11, 1942, and extending to and including the 31st day of December, 1945, to take sand and gravel from a parcel of land described in Exhibit "A", which said parcel of land consists of and is a sand and gravel bar adjacent to and on the westerly side of the Willamette River,

(b) That by said agreement the said Crown Zellerbach Corporation further granted to Plaintiff J. H. Gallagher the right to construct a private road upon its premises adjacent to the said gravel bar for the purpose of transporting any sand and gravel produced to market,

(c) On or about April 13, 1942, the Plaintiff J. H. Gallagher and the Plaintiffs J. Ira McNutt and Earl L. McNutt entered into a written agreement, a copy of which is attached hereto, marked Exhibit "B", whereby the Plaintiff J. H. Gallagher agreed to do certain things and the Plaintiffs J. Ira McNutt and Earl L. McNutt agreed, among other things, to install bunkers, machinery and equipment on the gravel bar and to process sand and gravel from the bar,

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\* Page numbering appearing at foot of page of original certified Transcript of Record.

(d) Subsequent to April 13, 1942, Plaintiffs expended over \$10,000.00 in building a private road, a substational portion of which was located upon land owned by said Crown Zellerbach Corporation adjacent to said sand and gravel bar.

(e) Subsequent to the construction of said road, soldiers from Camp Adair, near Corvallis, Oregon, acting under instructions of their superior officers, hauled over 66,917 cubic yards of sand and gravel in Army trucks and other conveyances over Plaintiffs' road to Camp Adair where [2] they were used upon the roads and in connection with other work within the limits of the Camp Adair Reservation,

(f) That said use of Plaintiffs' road was made by Defendant with full knowledge of the fact that it was Plaintiffs' property, and

(g) That the reasonable and fair market value of the use of Plaintiffs' road was and is in excess of \$7,500.00.

Wherefore, Plaintiffs pray that a judgment may be entered herein in their favor and against Defendant for \$7,500.00 and costs and for such other and further relief as may to the court seem proper.

/s/ LAURENCE T. HARRIS,  
HAMPSON, KOERNER,  
YOUNG & SWETT,  
/s/ JAMES C. DEZENDORF,

Attorneys for Plaintiffs. [3]

## EXHIBIT A

This Agreement, Made and entered into this 11th day of April, 1942, by and between Crown Zellerbach Corporation, a corporation of the State of Nevada, whose principal business is that of manufacturing paper, hereinafter called the "Seller," and J. H. Gallagher of Corvallis, Oregon, hereinafter called the "Purchaser,"

Witnesseth:

The parties hereto, each in consideration of the agreements and the performance thereof on the part of the other, do agree:

1. Easement to Obtain Sand and Gravel: Subject to the terms and conditions hereof and subject to the Purchaser commencing active operations hereunder within Ninety (90) days from the date of this agreement, the Seller hereby grants the Purchaser the right and privilege of taking sand and gravel from the following described property:

A parcel of land in Township 9 South, Range 4 West of the Willamette Meridian, Polk County, Oregon, more particularly described as follows, to-wit:

Beginning at a point Twenty (20) chains due East of the Township line from the Southwest corner of Section 35 and running thence East to the West boundary line of Isaac N. Miller's D.L.C.; thence Northeasterly along the West boundary line of said claim to Northwest corner thereof; thence East along the North boundary line of said claim



to the West bank of the Willamette River; thence with the meanderings of said river to the mouth of the Luckimute River; thence up the South bank with the meanderings of said river to a point due North of the place of beginning, and thence to the place of beginning, in Section 35, together with all accretion thereto which under the laws of the State of Oregon may be owned by the Paper Company.

The precise place or places from which said Purchaser shall be permitted to take sand and gravel hereunder shall be designated by the Purchaser from time to time as required by the users of the material and the areas from which sand and gravel may be taken hereunder shall be staked out upon the ground by the Purchaser subject to approval of the Seller, and such areas may not exceed the quantity in yardage required by the Purchaser to maintain his stock piles or fill the contract requirements of the users of such sand and gravel by more than Twenty-five (25%) Percent; in other words, it is understood by and between the parties hereto that the Seller may sell sand and gravel from the above described property to other persons, firms or corporations and that the Purchaser shall not be permitted to stake out in advance for purchase hereunder more than Twenty-five (25%) Percent in excess of the yardage which he expects to place in stock piles or sell to the users of such material within a reasonable period of time.

2. Easement for Location of Equipment and Bunkers: Subject to the terms and conditions



hereof, the Seller hereby grants the Purchaser such rights of way for roads, telephone and transmission lines or other facilities as may be required upon its property together with the right and privilege of occupying and using one or more locations upon its property to be hereafter staked out upon the ground by the Purchaser with the approval of the Seller, to be used by the Purchaser for the construction and maintenance of bunkers and other improvements and/or stock piles reasonably necessary and/or convenient for the handling of sand and gravel from the lands of the Seller under the provision of this agreement. [5]

3. **Manner of Operation:** It is expressly understood that the Purchaser, in taking said sand and gravel under the provision of this agreement, shall not needlessly interfere with the use of the adjacent property of the Seller, or with any operation of the Seller, and particularly the Purchaser shall not needlessly interfere in any manner with the operations of any other person, firm or corporation who may contract for the purchaser of sand and gravel from the hereinabove described property of the Seller immediately adjacent to or abutting upon the area staked out by the Purchaser with the approval of the Seller and from which sand and gravel is being removed hereunder by the Purchaser; nor shall the Seller or any other person, firm or corporation obtaining sand and gravel from such adjacent property, needlessly interfere with the operations of the Purchaser.

4. Use of Roads and Rights of Way: As part consideration for the sand and gravel purchased hereunder by the Purchaser, the Purchaser hereby agrees that the Seller or its Assignees shall have the right to use any private roads constructed by or used by the Purchaser for obtaining the sand and gravel purchased hereunder; it being understood that such private roads shall be available to the Seller and any persons, firms or corporations to whom the Seller may sell sand and gravel from and herein described property, provided the Seller and/or such persons, firms or corporations shall reimburse the Purchaser on some reasonable basis for the use of such private roads; such reimbursement to be at a reasonable royalty rate on a per cubic yard basis which would not be greater than a fair share or proportionate cost of constructing and maintaining such private road or roads, taking into consideration the yardage of sand and gravel being hauled by the Purchaser and the yardage of sand and gravel to be hauled by the Seller or such persons, firms or corporations to whom it might sell sand [6] and gravel. In the event the Purchaser is not carrying on active operations hereunder, he shall not be required to maintain his private roads for the use of others while not operating. It being understood that during such period of time, the Seller or such other persons, firms or corporations to which it may sell sand and gravel from its property shall, if using the private roads of the Purchaser, maintain such private roads in a good

state of repair until such time as the Purchaser may resume active operations hereunder.

5. Price for Sand and Gravel: For each cubic yard of sand and/or gravel removed from the property of the Seller as hereinabove described, the Purchaser shall pay the Seller Eight (8c) Cents per cubic yard; such rate shall apply to both washed and/or unwashed sand and gravel whether used for road material or for other concrete construction or maintenance. Provided, however, that if the State of Oregon shall assert a claim to any of the sand and gravel sold hereunder, the Seller may, at its option, refund the payment made by the Purchaser for the quantity of sand and gravel claimed by the State and in this event, the Purchaser shall assume the full liability of making payment to the State of Oregon for the sand and gravel or other material removed from any property, the title to which may rest in the State of Oregon, or, if it elects so to do, the Seller may retain the amount received from the Purchaser for sand and gravel removed from land claimed by the State of Oregon and in this event the Seller shall assume the obligation of defending any suit prosecuted in the name of the State of Oregon, but in the event of a judgment in favor of the State of Oregon, the Seller shall not be obligated to pay to the State of Oregon a sum in excess of the amount received from the Purchaser for the sand and gravel or other material claimed by the State of Oregon, and the Purchaser agrees to pay to the [7] State of Oregon any judg-

ment in excess of the amount received by the Seller. The Purchaser shall have the privilege of joining with the Seller in the defense of any suit which may be brought in the name of the State of Oregon to collect a royalty on any of the sand and gravel or other material removed from the hereinabove described property.

6. Payment for Sand and Gravel: On or before the 10th day of each month during the term of this agreement, the Purchaser will render the Seller a statement of all sand and/or gravel which may have been removed by it from the land of the Seller during the preceding month based upon the tickets issued on each load of material and will remit with such statement such amount as may be due the Seller hereunder for sand and/or gravel removed during the preceding month. The Seller shall have the right to examine all books, records and accounts of the Purchaser to satisfy itself as to the accuracy of statements rendered by the Purchaser and the Purchaser hereby agrees that tickets bearing consecutive numbers will be used in maintaining a record of the quantity of sand and/or gravel removed from the property of the Seller and shall issue a numbered ticket for each load of material removed from the property; such ticket to also show the date issued and bear the signature of the truck driver or the name of the person using the material.

7. Quality: The quality of the sand and/or gravel sold and purchaser hereunder shall conform to the specifications required for ordinary road con-



struction ballast or for concrete use in paving, foundation work or other building construction. Any soil or other waste material not suitable for use by the Purchaser may be excavated and placed upon the adjacent land of the Seller at a location to be designated by the Seller; provided, however, that such waste material shall be spread upon the adjacent land as directed by the Paper Company. It [8] being understood that such waste material may not be placed upon that portion of the land of the Paper Company not staked out by the Purchaser and from which sand and gravel may be sold to others.

8. Term: The term of this agreement shall be from date hereof to and including the 31st day of December, 1945. Provided, however, that this agreement shall automatically terminate in the event the Purchaser shall fail to commence active operations hereunder on or before July 1, 1942. The Purchaser shall be presumed to have commenced active operations hereunder if he shall commence the construction of bunkers and other improvements required for the handling of sand and gravel from the lands of the Seller and shall engage in placing sand and gravel in stock piles or in making actual delivery of such material to any persons engaged in road construction, foundation work or other building construction incidental to or in connection with the so-called Albany-Corvallis Cantonment for which construction contracts are now being let by the U. S. Army Engineers. If the operations of the Purchaser hereunder are conducted satisfactory to



the Seller, this agreement may be extended from year to year by mutual agreement between the parties hereto.

9. Indemnity: The Purchaser will save and hold harmless the Seller from any loss, damage, charge or expense, arising or growing out of the performance, non-performance and/or mal-performance by the Purchaser of the obligations assumed by him under this agreement, or in the performance by him of the operations contemplated hereunder.

10. Default: Upon default of the Purchaser in the performance of any obligation by him assumed hereunder, after Thirty (30) Days' notice in writing from the Seller requesting performance hereunder, the Seller may, at its [9] discretion, cancel and terminate this agreement by declaration in writing to that effect to be served upon the Purchaser.

11. Removal of Property: Within thirty (30) days after the expiration or termination of this agreement, the Purchaser will remove his bunkers, improvements and/or personal property from the property of the Seller.

12. Taxes and Liens: The Purchaser will promptly pay any and all taxes which may be lawfully assessed and levied against any improvements of the Purchaser erected hereunder and/or against the business and/or operations of the Purchaser hereunder, and will not permit such taxes and/or assessments to become delinquent.

The Purchaser will promptly pay for all labor and material which may be employed or used in the

conduct of his operations hereunder and will not suffer nor permit any lien of any kind or nature to attach to the property of the Seller by reason thereof.

13. Assignment: The Purchaser will not assign this agreement nor any interest herein, nor sublet any operation hereunder without first obtaining the consent in writing of the Seller to such assignment or subletting. Provided, however, that the Purchaser may assign this agreement to McNutt Brothers of Eugene, Oregon for the purpose of carrying out the provisions of said agreement but such assignment shall not be effective unless and until McNutt Brothers execute a formal agreement in favor of the Seller in which they agree to assume and carry out all of the obligations of the Purchaser hereunder. Such agreement shall incorporate all of the conditions and provision of this agreement by reference therein and the attachment thereto of the executed counterparts of this agreement. Such agreement shall further provide that the said McNutt Brothers may not thereafter assign the agreement or any [10] interest therein, nor sublet any operation thereunder without first obtaining the consent in writing of the Seller to such assignment or subletting.

14. This Agreement Exclusive: All other verbal and/or written agreements between the parties hereto, concerning the subject matter hereof, are hereby cancelled, terminated and held for naught, and it is expressly understood that this agreement

shall be the sole and exclusive agreement between the parties, governing their relations with respect to the subject matter of this agreement. And it is further understood between the parties hereto that the rights of the Purchaser to obtain sand and gravel from the hereinabove described real property of the Seller is not exclusive and that the Seller retains the right to sell sand and gravel from its property to other persons, firms or corporations and the right to go upon its property for all purposes incidental thereto and may permit others to construct and maintain on its premises bunkers and other improvements reasonably necessary and/or convenient for the removal of sand and gravel, all of which may be removed over any private rights of way or roads owned by, used by or in the possession of the Purchaser and/or his successors or assigns as of or subsequent to the date of this agreement.

15. Purchaser as Independent Operator: It is understood by and between the parties hereto, that the Purchaser shall operate hereunder as an Independent Contractor and/or Operator and not as an employe of the Seller, and that any person or persons employed by the said Purchaser to aid or assist in carrying on the work under the conditions of this Agreement, shall be employes of the said Purchaser and not employes of the Seller. [11]

(a) The Purchaser further agrees to carry on the work to be performed under this Agreement, within the terms of and subject to the compensation and/or

industrial insurance act of the State of Oregon, and will pay any and all sums due and payable therefor to the Commission administering such Act.

(b) The Purchaser further agrees to pay or cause to be paid to any Federal, State, County, City, Municipal or other agency, authority or commission having jurisdiction in the premises, any compensation, fee, license, tax or other payments, including employers' and employees' payroll contribution or deduction, required to be paid by the Purchaser, his representatives, agents or employees, or by his Assignees, Sub-contractors or the representatives, agents or employees of such Assignees or Sub-contractors, under the provisions of any law, ordinance or regulation applicable thereto; and, it is expressly understood and agreed by the parties hereto, that the Seller shall not be held liable or responsible for the collection, deduction and/or payment of any sums required to be paid as aforesaid, and the Purchaser will save and hold harmless the Seller from any and all liability whatsoever, for the collection, deduction and/or payment of any sums required to be paid under any such law, ordinance or regulation.

(c) The Purchaser has qualified or hereby agrees to immediately qualify and will require his Assignees and/or any and all Sub-contractors to qualify, and remain qualified for the term of this Agreement, as an employer or employers under any and all Social Security laws or similar statutes, if permitted so to do voluntarily or otherwise. [12]



In Witness Whereof, the parties hereto have caused this Agreement to be executed as below subscribed.

CROWN ZELLERBACH  
CORPORATION,  
By LOUIS BLACK,  
Chairman of the Board.

Attest:

D. J. GALEN,  
Secretary.

Witnesses:

E. H. POST,  
A. HEROUX.

J. H. GALLAGHER.

Witnesses:

BELLE K. GALLAGER,  
ALCON E. J. GALLAGHER.

Approved as to form:

GRIFFITH, PECK,  
PHILLIPS & NELSON,  
By CLARENCE D. PHILLIPS.

Approved:

E. H. P.,  
J. H. G. [13]



EXHIBIT B

Agreement

(Between McNutt Bros. and J. H. Gallagher)

This Agreement entered into between Earl L. McNutt and J. Ira McNutt, partners doing business under the firm name and style of McNutt Bros., and hereinafter for brevity sometimes referred to as "McNutt Bros.," and J. H. Gallagher, for brevity hereinafter sometimes referred to as "Gallagher,"

Witnesseth:

Recitals:

A. Gallagher has a letter from Crown Zellerbach Corporation dated March 13, 1942 committing that corporation to enter into a lease for the term of three (3) years, for the rentals and on the terms and conditions set forth in said letter, entitling Gallagher, his heirs or assigns, to remove sand and gravel from what is known as the Santiam Bar, which is located at a point near the confluence of the Santiam River with the Willamette River in Polk County, Oregon. It is contemplated that a formal lease will be executed by said Crown Zellerbach Corporation and said Gallagher. A copy of said lease, when made, shall be attached hereto and marked Exhibit A and made a part hereof.

B. A right of way has been granted by A. W. Crocker and his wife to Gallagher over what is known as the Crocker farm, and a copy of said grant of right of way is attached hereto, marked Exhibit B and made a part hereof.

C. L. M. Gossler and his wife have granted to Gallagher a right of way over the Gossler farm; and a copy of said grant of right of way is attached hereto, marked Exhibit C and made a part hereof.

D. The rights of way granted under and by force of Exhibits B and C afford ingress to and egress from said Santiam Bar. [14]

E. D. C. Crawford and his wife have granted to Gallagher, his heirs or assigns, a lease entitling Gallagher to take gravel and sand from an area inside lands owned by said Crawfords, for the price and on the terms and conditions set forth in said lease, and a copy of said lease is attached hereto, marked Exhibit D and made a part hereof.

F. Gallagher has incurred certain expenses in procuring said leases and rights of way.

G. Although the parties contemplate that most of the sand and gravel to be taken from the Santiam Bar will be used in connection with the development of the Cantonment now in the course of construction and situate between Corvallis and Monmouth, Oregon, nevertheless, it is also contemplated that McNutt Bros. will sell sand and gravel to any other party or parties desiring to buy for prices satisfactory to McNutt Bros.

Now, Therefore, in consideration of the premises and the mutual promises herein contained, and the moneys to be paid and things to be done as herein specified, it is agreed between the parties hereto as follows:

I.

Covenants by Gallagher

Gallagher covenants and agrees as follows:

1. That he will coincidently with the execution of these presents execute and deliver to McNutt Bros. assignments of:

- (a) The Santiam Bar lease;
- (b) The Crocker right of way;
- (c) The Gossler right of way; and
- (d) The Crawford lease.

2. That he will give such of his time and attention to sales of sand and gravel to be taken from said Santiam Bar and to the collection of the proceeds of such sales as [15] McNutt Bros. may from time to time request; and Gallagher shall be paid by McNutt Bros. for said services, on a sale basis, such amounts as the parties hereto may hereafter determine, together with his reasonable expenses incurred in the rendition of such services.

3. That he will endeavor to obtain leases on such other areas as are accessible to said Cantonment as McNutt Bros. may indicate, and if Gallagher does acquire such leases on such terms and for such prices as may be mutually satisfactory to him and McNutt Bros. he shall assign the same to McNutt Bros. on such terms as McNutt Bros. and Gallagher may hereafter agree.

II.

Covenants by McNutt Bros.

McNutt Bros. covenant and agree as follows:

1. That they will within a reasonable time fur-

nish and commence to install on the Santiam Bar, and with reasonable diligence complete the work of installing such equipment as will produce a minimum of seventy-five (75) yards more or less of sand and gravel per hour from said Santiam Bar.

2. That they will manage and carry on the work and business of operating said plant so to be installed until said Santiam Bar is exhausted, but in no event beyond the term of three years prescribed in the Santiam lease.

3. Nothing herein contained shall be so construed as to obligate McNutt Bros. to crush any gravel or any rock. However, it is agreed that if any rock or gravel is crushed in the operation of the plant on said Santiam Bar the parties hereto shall share in the profits on the same basis as herein prescribed.

### III.

#### Mutual Covenants and Agreements

It is agreed between Gallagher and McNutt Bros. as follows:

1. McNutt Bros. shall be paid each month as rental for the use of all equipment installed by them an amount equal to Ten percent (10%) of the original cost of such equipment for the first shift of each calendar day and Five percent (5%) for each additional shift in such calendar day.

Gallagher shall be paid rentals on the same basis as the rentals paid to McNutt Bros. for all equipment furnished by Gallagher at the request of McNutt Bros. and used by McNutt Bros. in the operation of the Santiam Bar.



2. The cost of placing equipment in position shall be included as a part of the expense of operation.

3. McNutt Bros. shall be reimbursed for expenses hereafter incurred.

4. Gallagher shall out of the first net profits be reimbursed for all expenses incurred by him to date.

5. Gallagher may from time to time and as often as he desires so to do call upon the Bookkeeper for information as to the then condition of the books with reference to the Santiam Bar.

6. All equipment furnished by the McNutt Bros. shall at the end of the operations hereunder be returned to McNutt Bros. in as good working condition as the same were at the time of the installation, reasonable wear and tear and damage by the elements excepted.

7. It is expressly agreed that the matter of operating the Crawford bar, if the same is operated, is to be determined by the parties hereto at some future time.

8. After paying all the expenses of the operation of the Santiam Bar the net profits, if any, shall be divided as follows: On the first day of each calendar month beginning with August 1, 1942, and so long as the parties hereto operate hereunder, all surplus funds remaining after the payment of expenses shall be divided one-third to J. H. Gallagher, one-third to Earl L. McNutt and one-third to J. Ira McNutt; and upon completion of the operations hereunder, with reference to the Santiam Bar, the McNutt Bros. shall furnish to Gallagher a complete statement showing the operations hereunder.



9. These presents shall be binding upon and the benefits thereof shall inure to not only the respective parties hereto but also to the respective heirs, legal representatives and assigns of the parties hereto.

In Witness Whereof the parties hereto have subscribed these presents in triplicate this 13th day of April, 1942.

/s/ EARL L. McNUTT,

/s/ J. IRA McNUTT,

Partners doing business under  
the name of McNutt Bros.

/s/ J. W. GALLAGHER.

State of Oregon,  
County of Benton—ss.

I, J. H. Gallagher, being first duly sworn, depose and say that I am one of the Plaintiffs in the above entitled action; and that the foregoing Complaint is true as I verily believe.

/s/ J. H. GALLAGHER.

Subscribed and sworn to before me this 20th day of August, 1946.

[Seal] /s/ W. M. BEALS,

Notary Public for Oregon.

My commission expires Dec. 2, 1949.

[Endorsed]: Filed Aug. 23, 1946. [18]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between Frank C. McColloch, attorney for Plaintiffs herein, and Henry L. Hess, United States Attorney for the District of Oregon, and Victor E. Harr, Assistant United States Attorney, attorneys for Defendant herein, that the defendant may, pursuant to approval of the Court, have 30 days from October 26, 1946, within which to answer or otherwise appear herein.

Dated at Portland, Oregon, this 23rd day of October, 1946.

/s/ FRANK C. MCCOLLOCH,  
Of Attorneys for Plaintiffs.

HENRY L. HESS,  
United States Attorney  
for the District of Oregon.

/s/ VICTOR E. HARR,  
Assistant United  
States Attorney,  
Attorneys for Defendant.

[Endorsed]: Filed October 29, 1946. [19]

[Title District Court and Cause.]

### ORDER

Based upon stipulation of Frank C. McColloch, attorney for Plaintiff's herein, and Henry L. Hess, United States Attorney for the District of Oregon, and Victor E. Harr, Assistant United States Attorney, Attorneys for Defendant, it is hereby

Ordered that the defendant be, and it is hereby, granted 30 days from October 26, 1946, within which to answer or otherwise appear herein.

Dated at Portland, Oregon, this 29th day of October, 1946.

CLAUDE MCCOLLOCH,  
District Judge.

[Endorsed]: Filed October 29, 1946. [20]

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[Title of District Court and Cause.]

### STIPULATION

It Is Hereby Stipulated by and between James C. Dezendorf, attorney for Plaintiffs herein, and Henry L. Hess, United States Attorney for the District of Oregon, and Victor E. Harr, Assistant United States Attorney, attorneys for Defendant herein, that the defendant may, pursuant to approval of the Court, have 30 days from November 26, 1946, within which to answer or otherwise appear herein.

Dated at Portland, Oregon, this 26th day of November, 1946.

/s/ JAMES C. DEZENDORF,  
Attorney for Plaintiffs.

HENRY L. HESS,  
United States Attorney  
for the District of Oregon.

/s/ VICTOR E. HARR,  
Assistant United  
States Attorney,  
Attorneys for Defendant.

[Endorsed]: Filed December 2, 1946. [21]

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[Title of District Court and Cause.]

### ORDER

Based upon stipulation of James C. Dezendorf, attorney for plaintiffs herein, and Henry L. Hess, United States Attorney for the District of Oregon, and Victor E. Harr, Assistant United States Attorney, attorneys for defendant, it is hereby

Ordered that the defendant be, and it is hereby granted 30 days from November 26, 1946, within which to answer or otherwise appear herein.

Dated at Portland, Oregon, this 2nd day of December, 1946.

CLAUDE McCOLLOCH,  
District Judge.

[Endorsed]: Filed December 2, 1946. [22]

[Title of District Court and Cause.]

### MOTION TO DISMISS

Comes Now the defendant, the United States of America, and moves the Court for an order dismissing the above entitled cause wherein the plaintiffs seek recovery in the sum of \$7,500.00 claimed to be due as compensation on a contract implied in fact for the reason that it appears on the face of the Complaint that there is a lack of allegations on jurisdictional matters as required by Section 268, U.S.C. Title 28.

Dated at Portland, Oregon, this 23rd day of December, 1946.

HENRY L. HESS,

United States Attorney

for the District of Oregon.

/s/ J. ROBERT PATTERSON,

Assistant United States

Attorney.

United States of America,

District of Oregon—ss.

I, J. Robert Patterson, Assistant United States Attorney for the District of Oregon, hereby certify that I have made service of the foregoing Motion to Dismiss, Civil No. 3242, by depositing in the United States Post Office at Portland, Oregon, on the 23rd day of December, 1946, duly certified copies thereof, enclosed in envelopes, with postage thereon prepaid addressed to Hampson, Koerner, Young &



Swett, Attorneys at Law, Pacific Building, Portland, Oregon, Attorneys for the Plaintiffs.

/s/ J. ROBERT PATTERSON,  
Assistant United States  
Attorney.

[Endorsed]: Filed December 23, 1946. [23]

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[Title of Cause.]

## ORDER CONTINUING MOTION TO DISMISS

Plaintiffs appearing by Mr. James C. Dezendorf, of counsel, defendant by Mr. J. Robert Patterson, Assistant United States Attorney.

It Is Ordered that defendant's motion to dismiss be and it is hereby continued to the time of pre-trial hearing.

January 13, 1947. [24]

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[Title of District Court and Cause.]

## ANSWER

Comes Now the defendant and for answer to the complaint on file herein alleges:

### I.

Admits paragraph I, II, and III of the plaintiff's complaint.

### II.

Admits sub-paragraphs (a), (b) and (c) of paragraph IV of the plaintiff's complaint.

## III.

The defendant does not have information sufficient to form a belief as to the truth or falsity of sub-paragraphs (d) and (e) of paragraph IV of the plaintiffs' complaint and therefore denies the same.

## IV.

Denies sub-paragraphs (f) and (g) of paragraph IV of plaintiffs' complaint.

## Further and Separate Defense

The defendant alleges:

## I.

That on the 14th day of May, 1945, in the District Court of the United States for the District of Oregon in an action of eminent domain proceedings by the United States against L. M. Gossler and in which these same plaintiffs, J. H. Gallagher, J. Ira McNutt and Earl L. McNutt intervened, said action being numbered Civil 1729 and being the same cause of action herein, said defendants therein and plaintiffs herein recovered judgment; that said [25] judgment was duly given and made against the plaintiffs therein defendant herein and among other things provided.

“It Further Appearing to the Court that this matter having come on for trial on November 21, 1944 to determine the value of the remaining interest in and to said property, to-wit: the private roadway easement above referred to, and the plaintiff, United States of America, and the defendants, J. H. Gallagher and Belle K.

Gallagher, his wife, and Earl L. McNutt and J. Ira McNutt, co-partners doing business under the firm name and style of McNutt Bros., having stipulated in open Court by their respective Counsel that the jury, upon the trial, should fix the full market value of said defendants' interest in 1.8 miles of road leading to the Santiam Bar and including damage to said defendants' interest in said Bar arising out of a contract with Crown Zellerbach Corporation, dated April 11, 1942: \* \* \*"

That said judgment has not been set aside, appealed, modified, or reversed, but that the same remains in full force and that the said judgment has been fully satisfied by payment by the defendant, United States of America.

Wherefore, defendant prays that the plaintiffs take nothing by this action and that this action be dismissed and that the defendant recover its costs and disbursements incurred herein.

HENRY L. HESS,  
United States Attorney  
for the District of Oregon.

/s/ J. ROBERT PATTERSON,  
Assistant United States  
Attorney.

United States of America,  
District of Oregon—ss.

I, J. Robert Patterson, Assistant United States Attorney for the District of Oregon, hereby certify that I have made service of the foregoing Answer, Civil No. 3242, by depositing in the United States Post Office at Portland, Oregon, on the 15th day of January, 1947, duly certified copies thereof, enclosed in envelope with postage thereon prepaid, addressed to James C. Dezendorf, Attorney at Law, Pacific Building, Portland, Oregon, Attorney for the Plaintiffs.

/s/ J. ROBERT PATTERSON,  
Assistant United States  
Attorney.

[Endorsed]: Filed January 15, 1947. [26]

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[Title of Cause.]

#### ORDER SETTING CAUSE FOR PRE-TRIAL

Now at this day It Is Ordered that this cause be and it is hereby set for pre-trial conference for Monday, February 10, 1947.

January 31, 1947. [27]

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[Title of District Court and Cause.]

#### MOTION FOR JUDGMENT ON PLEADINGS

Comes Now the defendants, United States of America by Henry L. Hess, and J. Robert Patter-

son, Assistant United States Attorney and moves the Court for Judgment on the pleadings in this cause for the reason that it appears from the pleadings and also from the Judgment which was entered in this same Court in the case of United States of America vs. L. M. Gossler et. al, Civil 1729, that this matter has been fully adjudicated and the prior judgment is a bar to this action.

Dated this 7th day of February, 1947.

HENRY L. HESS,  
United States Attorney  
for the District of Oregon.

/s/ J. ROBERT PATTERSON,  
Assistant United States  
Attorney.

United States of America,  
District of Oregon—ss.

I, J. Robert Patterson, Assistant United States Attorney for the District of Oregon, hereby certify that I have made service of the foregoing Motion for Judgment on Pleadings, Civil No. 3242 by depositing in the United States Post Office at Portland, Oregon, on the 7th day of February, 1947, duly certified copies thereof, enclosed in envelope, with postage thereon prepaid, addressed to James C. Dezendorf, Attorney at Law, Pacific Building, Portland, Oregon, Attorney for the Defendants.

/s/ J. ROBERT PATTERSON,  
Assistant United States  
Attorney.

[Endorsed]: Filed February 7, 1947. [28]



[Title of Cause.]

### ORDER SETTING CAUSE FOR TRIAL

Now at this day come the plaintiff by Mr. James C. Dezendorf, of counsel, and the defendant by Mr. J. Robert Patterson, Assistant United States Attorney. Whereupon this cause comes on to be heard upon defendant's motion for summary judgment herein, and the Court having heard the arguments of counsel reserves its decision to the time of trial. Pre-trial conference had, and

It Is Ordered that this cause be and it is hereby set for trial for Tuesday, March 11, 1947.

February 10, 1947. [29]

[Title of District Court and Cause.]

### PRE-TRIAL ORDER

The above entitled action came on regularly for a pre-trial conference before the undersigned judge of the above entitled court on Monday, January 6, 1947, at 10:30 o'clock a.m. Plaintiffs appeared by and through James C. Dezendorf, of their attorneys. Defendants appeared by and through J. Robert Patterson, Assistant United States Attorney.

Counsel for Plaintiffs asked leave to amend the Complaint by interlineation to insert the following paragraph between Paragraphs II and III, to be numbered II-A:

"Each of the Plaintiffs is a citizen of the United States and has at all times borne true allegiance to the Government of the United

States and has not in any way voluntarily aided, abetted or given encouragement to rebellion against the Government of the United States.”

The court allowed the amendment.

### Agreed Facts

It was then agreed between counsel for Plaintiffs and defendant that the following facts were and are true:

(1) This action arises under the Act of March 3, 1887, c. 359, Sections 1, 2, 24 Stat. 505, as amended; U.S.C., Title 28, Sections 41(20) and 250(1), commonly known as the Tucker Act.

(2) Plaintiff J. H. Gallagher resides in the City of Corvallis, Benton County, Oregon; Plaintiffs J. Ira McNutt and Earl [30] L. McNutt reside in the City of Eugene, Lane County, Oregon.

(3) Each of the Plaintiffs is a citizen of the United States and has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted or given encouragement to rebellion against the Government of the United States.

(4) On or about April 11, 1942, Plaintiff J. H. Gallagher entered into an agreement in writing with Crown Zellerbach Corporation, a copy of which agreement is attached to the Complaint, marked Exhibit “A”, whereby said Crown Zellerbach Corporation granted to Plaintiff J. H. Gallagher the right, for the period beginning April 11, 1942, and

extending to and including the 31st day of December, 1945, to take sand and gravel from a parcel of land described in Exhibit "A", which said parcel of land consists of and is a sand and gravel bar adjacent to and on the westerly side of the Willamette River.

(5) That by said agreement the said Crown Zellerbach Corporation further granted to Plaintiff J. H. Gallagher the right to construct a private road upon its premises adjacent to the said gravel bar for the purpose of transporting any sand and gravel produced to market.

(6) On or about April 13, 1942, the Plaintiff J. H. Gallagher and the Plaintiffs J. Ira McNutt and Earl L. McNutt entered into a written agreement, a copy of which is attached to the Complaint and marked Exhibit "B", whereby the Plaintiff J. H. Gallagher agreed to do certain things and the Plaintiffs J. Ira McNutt and Earl L. McNutt agreed, among other things, to install bunkers, machinery and equipment on the gravel bar and to process sand and gravel from the bar.

(7) Subsequent to April 13, 1942, Plaintiffs built a private road from the gravel bar to the county road, a substantial [31] portion of which was located on land owned by Crown Zellerbach Corporation, adjacent to said sand and gravel bar. The road also crossed land owned by L. M. Gossler and Alta L. Gossler and also land owned by A. W. Crocker and Agnes M. Crocker.

(8) Plaintiffs procured appropriate easements from the owners of the property upon which their road was constructed.

(9) On June 18, 1942, by appropriate order in a proceeding filed in this court, Defendant was granted possession of the property owned by L. M. Gossler and Alta L. Gossler and A. W. Crocker and Agnes M. Crocker, upon a portion of which Plaintiffs had constructed a portion of their road. Defendant has never procured, through legal proceedings, an order for possession of the property owned by Crown Zellerbach adjacent to the Santiam Bar, upon which Plaintiffs constructed the balance of their road.

(10) On October 5, 1942, Defendant filed a Declaration of Taking, accompanied by the deposit of appropriate funds, in connection with condemnation of the property owned by L. M. Gossler and Alta L. Gossler and A. W. Crocker and Agnes M. Crocker.

(11) Plaintiff J. H. Gallagher and his wife, Belle K. Gallagher, were joined as Defendants in the condemnation action relating to the Gossler land and during the course of said action plaintiffs Earl L. McNutt and J. Ira McNutt intervened in said condemnation action. None of the Plaintiffs were joined in the condemnation proceedings relating to the Crocker land.

(12) On November 21, 1944, the condemnation action to determine the value of Plaintiffs' interest in the Gossler land came on regularly for trial before a jury in this court and at the commencement



thereof it was stipulated between counsel representing Plaintiffs herein: [32]

(Excerpt from Transcript of Testimony and Proceedings in Civil No. 1729—U. S. vs. Gossler, et al.)

Mr. Falk: May it please the Court—I will say this, Mr. Dezendorf, I stated yesterday, not in the presence of the reporter—and it may be that your purpose was to have a record—that so far as the Government is concerned I believe that testimony in this case showing the value of the entire road is proper, that I will not object to any testimony showing the value of the entire road.

Mr. Dezendorf: That does not go quite as far as we went yesterday, and perhaps, now that we have a reporter here, we had better get a clear understanding on it. So far as these defendants are concerned, we are willing to try, all in this one lawsuit, the value of the road and of our interest in the gravel bar. In other words, technically, you probably have only taken in this proceeding a portion of our road and probably will be limited to that if you wish to, but we are willing to try the whole interest of the value of the road and of the gravel in this one lawsuit.

Mr. Falk: I am, Mr. Dezendorf, willing to try the value of your interest in the entire road and the value of your interest in the gravel bar, and that is what I expected would be tried.



The Court: Well, that relieves the Court of some of the responsibility, because with this stipulation I take it that the parties can stipulate to try any questions that they want to. This is a stipulation to try out certain questions which may not technically be in the case, and I shall treat it as that. As to the other question, my mind is not made up. I will have to make it up when the testimony is offered. [33]

(13) On November 24, 1944, the jury returned a verdict upon which judgment was duly entered in favor of Plaintiffs herein in the sum of \$1,000.00 and Plaintiffs herein received the amount awarded them by said verdict and judgment as aforesaid.

(14) Between May 9, 1942, and June 20, 1942, Plaintiffs processed, washed, screened and stockpiled and were the owners of 13,743 cubic yards of sand and gravel which was then situated upon the Santiam Bar.

(15) Between May 9, 1942, and October 1, 1942, Plaintiffs sold and removed from said stockpiles and transported over their road 3,740 cubic yards of said stockpiled sand and gravel.

(16) Between July 1, 1942, and September 16, 1942, Strong and McDonald moved 68,203 cubic yards of sand and gravel from the Santiam Bar over the road constructed by Plaintiffs and paid to Plaintiffs for said use of their road the sum of \$3,000.00.

(17) Between October 1, 1942, and August 19, 1944, the Defendant moved 66,643 cubic yards of

sand and gravel from the Santiam Bar over the road constructed by Plaintiffs.

(18) On November 18, 1942, Crown Zellerbach Corporation granted permission to the Defendant to remove sand and gravel from the Santiam Bar with the understanding that the rights of Plaintiffs under the agreement between Crown Zellerbach Corporation and J. H. [34] Gallagher of April 11, 1942, a copy of which is attached to the Complaint as Exhibit "A", would be protected. A duplicate original of the contract between Defendant and Crown Zellerbach Corporation is marked Exhibit 1 for identification.

### Issues to Be Determined

#### I.

Whether the Defendant herein acquired ownership of that portion of Plaintiffs' road which was constructed upon land owned by Crown Zellerbach Corporation in the condemnation action relating to the Gossler land.

#### II.

Assuming the Defendant herein acquired ownership of that portion of Plaintiff's road which was constructed upon land owned by Crown Zellerbach Corporation, whether it acquired title to the Crown Zellerbach portion of the road prior to November 21, 1944.

#### III.

Assuming either (1) the Defendant did not acquire ownership of that portion of Plaintiffs' road

which was constructed upon land owned by Crown Zellerbach Corporation in the condemnation action relating to the Gossler land, or (2) that defendant acquired title to the Crown Zellerbach Corporation portion of the road on November 21, 1944, whether plaintiffs have a valid claim against the defendant for hauling 66,643 cubic yards of sand and gravel over that portion of their road constructed upon the land owned by Crown Zellerbach Corporation.

#### IV.

Assuming Plaintiffs have a valid claim against the defendant for its use of that portion of their road constructed upon the land owned by Crown Zellerbach Corporation, the amount which Plaintiffs are entitled to recover from Defendant[s] [35]

#### Exhibits

Plaintiffs' 1. Agreement dated November 18, 1942, between Crown Zellerbach Corporation and Defendant.

Defendant's 2. Judgment on the Verdict, Civil 1729.

Defendant's 3. Order Disbursing Funds and Final Judgment in Condemnation, Civil 1729.

Plaintiffs' 4. Agreement dated April 11, 1942, between Crown Zellerbach Corporation and J. H. Gallagher.

Plaintiffs' 5. Agreement dated April 13, 1942, between McNutt Bros. and J. H. Gallagher.

The foregoing Pre-trial Order having been duly agreed upon by the parties is hereby entered this 19th day of March, 1947.

CLAUDE McCOLLOCH,  
District Judge.

Order agreeable:

/s/ JAMES DEZENDORF,  
Of attorneys for Plaintiffs.

/s/ EDWARD B. TWINING,  
Of attorneys for Defendant.

[Endorsed]: Filed March 19, 1947. [36]

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[Title of Cause.]

### JOURNAL ENTRY

Now at this day come the plaintiffs by Mr. James C. Dezendorf, of counsel and the defendant by Mr. Edward B. Twining, Assistant United States Attorney and Mr. Linus M. Fuller, Special Assistant to the United States Attorney. Whereupon this cause comes on to be tried before the Court, and the Court having heard the statements of counsel, evidence adduced and the arguments of counsel, will advise thereof.

March 19, 1947. [37]

In the District Court of the United States  
for the District of Oregon

Civil No. 3242

J. H. GALLAGHER, J. IRA McNUTT and  
EARL L. McNUTT,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendants.

### MEMORANDUM OPINION

It is doubtful, as Government counsel conceded at the trial, whether former adjudication bars the plaintiff. This leaves the equitable plea of estoppel for consideration. I think it is not inequitable for plaintiff to recover his cost less sums and credits previously received. That figures out:

Cost .....	\$10,190.00
Less McDonald .....	\$3,000.00
Verdict Gossler case.....	1,000.00
Plaintiff's own use .....	374.00
	<hr/>
Judgment herein .....	\$ 5,816.00

Dated March 21, 1947.

CLAUDE McCOLLOCH,  
Judge.

[Endorsed]: Filed March 21, 1947. [38]



[Title of District Court and Cause.]

OBJECTIONS TO PROPOSED FINDINGS OF  
FACT AND CONCLUSIONS OF LAW

Comes now the defendant, United States of America by Henry L. Hess, United States Attorney and Edward B. Twining and Linus M. Fuller, Assistant United States Attorneys and moves that the proposed findings of fact as heretofore submitted by counsel for the plaintiff in this case be amended as follows to-wit:

I.

That lines 3, 4, and 5 of paragraph VII on page 3 be stricken and deleted and that there be substituted therefor the following, to-wit:

“Between April 13th and June 18th, 1942, Plaintiffs built a private road from the gravel bar to the county road, a distance of 1 8/10 miles, a substantial portion of which, or 6/10 of a mile was located on land owned by Crown Zellerbach Corporation,” \* \* \*

II.

That lines 16 and 17 of paragraph IX on page 3 be amended as follows, to-wit:

“Upon a portion of which Plaintiffs had constructed 1 2/10 miles of their road.”

And that line 20 of said paragraph be amended, to-wit:

“The balance, or 6/10 of a mile of their road.”

## III.

That lines 7 and 8 of paragraph XII on page 4 be stricken and deleted and that there be substituted therefore the following, to-wit:

“That the value of Plaintiffs interest in the entire road including the Crown Zellerbach section thereof and the value of Plaintiffs interest in the gravel bar should be tried in the condemnation action.” [39]

## IV.

That paragraph XVI on page 4 be stricken and deleted and that there be substituted therefor the following, to-wit:

“Between July 1st, 1942, and September 16, 1942, Strong and McDonald moved 68,203 cubic yards of sand and gravel and paid to Plaintiffs the sum of \$3,000.00 for the use of 18/10 miles of plaintiffs' road.

## V.

That paragraph XVII on page 4 be stricken and deleted and that there be substituted therefor the following, to-wit:

“Between October 1, 1942, and August 19, 1944, the defendant moved 66,643 cubic yards of sand and gravel from the Santiam Bar over 6/10 of a mile of Plaintiffs' road crossing the Crown Zellerbach Tract.”

## VI.

That paragraph XIX on page 5 be stricken and deleted and that there be substituted therefor the following, to-wit:

“In the condemnation action, Civil 1729, on November 21, 1944, the value of plaintiffs’ interest in the entire  $1\frac{8}{10}$  miles of road including the Plaintiffs’ interest in the  $\frac{6}{10}$  of a mile of road crossing the Crown Zellerbach Tract was submitted, considered and decided by the jury.”

## VII.

That paragraphs XX, XXI and XXII on page 5 be stricken.

## VIII.

That there be added to the findings of fact the following paragraph, to-wit:

“That the cost of the entire mile and  $\frac{8}{10}$  of a mile of road built by Plaintiff was \$10,190, \$1190 of which was paid by Plaintiff for easements crossing the Gossler and Crocker Tracts, that the Crown Zellerbach Section of the road is  $\frac{6}{10}$  of a mile in length, that the cost to Plaintiff of said  $\frac{6}{10}$  of a mile of road was \$3,000.

## IX.

That there be added to the findings of fact the following paragraph, to-wit:

“Plaintiffs received \$3000 from Strong and

McDonald for the use of their road; they received \$1000 in the Gossler condemnation [40] case and \$374 as the fair market value of Plaintiffs' own use of the road,  $\frac{1}{3}$  of the total receipts, \$4,374, should be apportioned to the Crown Zellerbach Section of the road.

### Conclusions of Law

The defendants further move that the proposed conclusions of law as submitted by the plaintiff be amended as follows, to-wit:

#### I.

That paragraphs I, II, III and IV of conclusions of law be stricken and that the following be substituted therefor:

#### I.

“That the Stipulation of parties and the verdict of the jury in the condemnation action, Civil 1729 bars any recovery by plaintiff for use by defendant subsequent to June 18, 1942, of the Crown Zellerbach portion of plaintiffs' road.

#### II.

“That judgment should be entered herein in favor of defendant and that plaintiff take nothing by this action.

Dated this 3rd day of April, 1947.

/s/ EDWARD B. TWINING,  
Assistant United States  
Attorney.

United States of America,  
District of Oregon—ss.

Due and legal service of the within Objections to Proposed Findings of Fact is hereby accepted within the State and District of Oregon, on the 3rd day of April, 1947, by receiving a copy thereof duly certified to as true and correct copy of the original by Edward B. Twining, Assistant United States Attorney, for the District of Oregon.

/s/ ALFRED H. CORBETT,  
Of Attorneys for Plaintiff.

[Endorsed]: Filed April 3, 1947. [41]

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In the District Court of the United States  
for the District of Oregon

Civil No. 3242

J. H. GALLAGHER, J. IRA McNUTT and  
EARL L. McNUTT,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

FINDINGS OF FACT, CONCLUSIONS  
OF LAW AND JUDGMENT

The above entitled action came on regularly for trial before the undersigned judge of the above entitled court on Wednesday, March 19, 1947, at 10:00



o'clock a.m. Plaintiffs appeared in person and by and through James C. Dezendorf, of their attorneys. Defendant appeared by and through Edward B. Twining and Linus M. Fuller, Assistant United States Attorneys. The Pre-trial Order, approved by the parties was signed and entered. After opening statements of counsel, the evidence of Plaintiffs and Defendant was heard and received. After both parties rested, arguments of counsel were heard, at the close of which the cause was submitted and the court took the matter under advisement. On March 21, 1947, the court handed down a Memorandum Opinion and in accordance therewith the court hereby makes and enters the following

### Findings of Fact

#### I.

This action arises under the Act of March 3, 1887, c. 359, Sections 1, 2, 24 Stat. 505, as amended; U.S.C., Title 28, Sections 41(20) and 250(1), commonly known as the Tucker Act.

#### II.

Plaintiff, J. H. Gallagher resides in the City of Corvallis, Benton County, Oregon; Plaintiffs J. Ira McNutt and Earl L. McNutt reside in the City of Eugene, Lane County, Oregon. [42]

#### III.

Each of the Plaintiffs is a citizen of the United States and has at all times borne true allegiance to

the Government of the United States and has not in any way voluntarily aided, abetted or given encouragement to rebellion against the Government of the United States.

#### IV.

On or about April 11, 1942, Plaintiff J. H. Gallagher entered into an agreement in writing with Crown Zellerbach Corporation, a copy of which agreement is attached to the Complaint, marked Exhibit "A", whereby said Crown Zellerbach Corporation granted to Plaintiff J. H. Gallagher the right, for the period beginning April 11, 1942, and extending to and including the 31st day of December, 1945, to take sand and gravel from a parcel of land described in Exhibit "A", which said parcel of land consists of and is a sand and gravel bar adjacent to and on the westerly side of the Willamette River.

#### V.

That by said agreement the said Crown Zellerbach Corporation further granted to Plaintiff J. H. Gallagher the right to construct a private road upon its premises adjacent to the said gravel bar for the purpose of transporting any sand and gravel produced to market.

#### VI.

On or about April 13, 1942, the Plaintiff J. H. Gallagher and the Plaintiffs J. Ira McNutt and Earl L. McNutt entered into a written agreement, a copy of which is attached to the Complaint and marked Exhibit "B", whereby the Plaintiff J. H.

Gallagher agreed to do certain things and the Plaintiffs J. Ira McNutt and Earl L. McNutt agreed, among other things, to install bunkers, machinery and equipment on the gravel bar and to process sand and gravel from [43] the bar.

## VII.

Subsequent to April 13, 1942, Plaintiffs built a private road from the gravel bar to the county road, a substantial portion of which was located on land owned by Crown Zellerbach Corporation, adjacent to said sand and gravel bar. The road also crossed land owned by L. M. Gossler and Alta L. Gossler and also land owned by A. W. Crocker and Agnes M. Crocker.

## VIII.

Plaintiffs procured appropriate easements from the owners of the property upon which their road was constructed.

## IX.

On June 18, 1942, by appropriate order in a proceeding filed in this court, Defendant was granted possession of the property owned by L. M. Gossler and Alta L. Gossler and A. W. Crocker and Agnes M. Crocker, upon a portion of which Plaintiffs had constructed a portion of their road. Defendant has never procured, through legal proceedings, an order for possession of the property owned by Crown Zellerbach adjacent to the Santiam Bar, upon which Plaintiffs constructed the balance of their road.

## X.

On October 5, 1942, Defendant filed a Declaration of Taking, accompanied by the deposit of appropriate funds, in connection with condemnation of the property owned by L. M. Gossler and Alta L. Gossler and A. W. Crocker and Agnes M. Crocker.

## XI.

Plaintiff J. H. Gallagher and his wife, Belle K. Gallagher, were joined as Defendants in the condemnation action relating to the Gossler land and during the course of said action Plaintiffs Earl L. Gossler and J. Ira McNutt intervened in said condemnation action. None of the Plaintiffs were joined in the condemnation proceedings relating [44] to the Crocker land.

## XII.

On November 21, 1944, a condemnation action to determine the value of Plaintiffs' interest in the Gossler land came on regularly for trial before a jury in this court and at the commencement thereof it was stipulated between counsel then representing the parties as appears on page 3a of the Pre-trial Order.

## XIII.

On November 24, 1944, the jury returned a verdict upon which judgment was duly entered in favor of Plaintiffs herein in the sum of \$1,000.00 and Plaintiffs herein received the amount awarded them by said verdict and judgment as aforesaid.

## XIV.

Between May 9, 1942, and June 20, 1942, Plaintiffs processed, washed, screened and stockpiled and were the owners of 13,743 cubic yards of sand and gravel which was then situated upon the Santiam Bar.

## XV.

Between May 9, 1942, and October 1, 1942, Plaintiffs sold and removed from said stockpiles and transported over their road 3,740 cubic yards of said stockpiled sand and gravel.

## XVI.

Between July 1, 1942, and September 16, 1942, Strong and McDonald moved 68,203 cubic yards of sand and gravel from the Santiam Bar over the road constructed by Plaintiffs and paid to Plaintiffs for said use of their road the sum of \$3,000.00.

## XVII.

Between October 1, 1942, and August 19, 1944, the Defendant moved 66,643 cubic yards of sand and gravel from the Santiam Bar over the road constructed by Plaintiffs.

## XVIII.

On November 18, 1942, Crown Zellerbach Corporation granted [45] permission to the Defendant to remove sand and gravel from the Santiam Bar



with the understanding that the rights of Plaintiffs under the agreement between Crown Zellerbach Corporation and J. H. Gallagher of April 11, 1942, a copy of which is attached to the Complaint as Exhibit "A", would be protected.

### XIX.

Plaintiffs' claim presented herein for the reasonable and fair market value of the use by the Government of their road was not submitted, considered or fully decided in the condemnation action relating to the Gossler land.

### XX.

Defendant was fully advised of Plaintiffs' interest in their road at the time said road was used by it in hauling 66,643 cubic yards of sand and gravel thereon and Defendant's use thereof was not made under a claim of ownership thereof.

### XXI.

Plaintiffs' road cost \$10,190.00; they received \$3,000.00 from Strong and McDonald for the use thereof; they received \$1,000.00 in the Gossler condemnation case, and \$374.00 is the fair market value of Plaintiffs' own use of the road.

### XXII.

The reasonable and fair market value of Defendant's use of Plaintiffs' road was and is the sum of \$5,816.00.

Based upon the foregoing Findings of Fact, the court hereby makes and enters the following:

### Conclusions of Law

#### I.

Defendant did not acquire ownership of that portion of Plaintiffs' road which was constructed upon land owned by Crown Zellerbach Corporation in the condemnation action relating to the [46] Gossler land and the claim asserted by Plaintiffs herein has not been submitted, considered or fully decided in any other action or proceeding.

#### II.

Plaintiffs have a valid claim against Defendant for the reasonable and fair market value of the use made by Defendant of their road in hauling 66,643 cubic yards of sand and gravel thereon.

#### III.

Defendant used Plaintiffs' road under circumstances warranting the implication of a contract implied in fact to pay Plaintiffs the reasonable and fair market value of the use thereof.

#### IV.

That judgment should be entered herein favor of Plaintiffs and against Defendant for \$5,816.00.

## V.

The Pre-trial Order should be and it is hereby on the Court's own motion and in the interest of manifest justice amended to accord with these findings, conclusions and judgment.

Based upon the foregoing Findings of Fact and Conclusions of Law,

It Is Hereby Ordered, Adjudged and Decreed That Plaintiffs be and they hereby are awarded judgment against Defendant for the sum of \$5,-816.00.

Dated this 4th day of April, 1947.

/s/ CLAUDE McCOLLOCH,  
District Judge.

State of Oregon,  
County of Multnomah—ss.

Service of the foregoing Findings of Fact, Conclusions of Law and Judgement by copy, as prescribed by law is hereby admitted, at Portland, Oregon, this 24th day March, 1947.

/s/ EDWARD B. TWINING,  
Of Attorneys for Defendant.

[Endorsed]: Filed April 4, 1947. [47]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL AND FOR  
AMENDMENT OF FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND JUDG-  
MENT

Comes Now the United States of America, defendant in the above-entitled cause, by Henry L. Hess, United States Attorney for the District of Oregon, and Edward B. Twining, Assistant United States Attorney, and moves the Court for a new trial for the following reasons:

1. The Court erred in that the Court did not find that Plaintiffs' action in this case was *res adjudicata* by reason of decision in *United States vs. Gossler, et al.*, Civil No. 1729, and the stipulation of the parties and the verdict of the jury in said case.

2. The Court erred in that the Court did not find Plaintiffs were estopped from recovering in this action by the proceeding in the *United States vs. Gossler, et al.*, Civil No. 1729 and the stipulation of the parties and the verdict of the jury in said case.

3. The Court erred in basing judgment in this case upon testimony of the cost of road construction of a road not within the issues formulated in this case and the cost of construction of said road during a period of time not within the issues formulated in this case.

4. The Court erred in entering judgment for the Plaintiffs in this case in that no evidence was presented by Plaintiffs as to the reasonable and fair market value of the use of Plaintiffs' road and particularly, that no such evidence was presented pertaining to a period of time within the formulated issues in this case.

Defendant, United States of America, Further Moves the Court for Amendment of Findings of Fact, Conclusions of Law and Judgment heretofore filed in this case, in the following particulars, to-wit: [48]

### I.

That lines 3, 4, and 5 of paragraph VII on page 3 be stricken and deleted and that there be substituted therefore the following, to-wit:

“Between April 13th and June 18th, 1942, Plaintiffs built a private road from the gravel bar to the county road, a distance of  $1\frac{8}{10}$  miles, a substantial portion of which, or  $\frac{6}{10}$  of a mile was located on land owned by Crown Zellerbach Corporation,” \* \* \*

### II.

That lines 16 and 17 of paragraph IX on page 3 be amended as follows, to-wit:

“Upon a portion of which Plaintiffs had constructed  $1\frac{2}{10}$  miles of their road.”



And that line 20 of said paragraph be amended, to-wit:

“The balance, or 6/10 of a mile of their road.”

### III.

That lines 7 and 8 of paragraph XII on page 4 be stricken and deleted and that there be substituted therefore the following, to-wit:

“That the value of Plaintiffs’ interest in the entire road including the Crown Zellerbach section thereof and the value of Plaintiffs’ interest in the gravel bar should be tried in the condemnation action.”

### IV.

That paragraph XVI on page 4 be stricken and deleted and that there be substituted therefore the following, to-wit:

“Between July 1st, 1942, and September 16, 1942, Strong and McDonald moved 68,203 cubic yards of sand and gravel and paid to Plaintiffs the sum of \$3,000.00 for the use of 18/10 miles of Plaintiffs’ road.

### V.

That paragraph XVII on page 4 be stricken and deleted and that there be substituted therefor the following, to-wit:

“Between October 1, 1942, and August 19, 1944, the defendant moved 66,643 cubic yards

of sand and gravel from the Santiam Bar over 6/10 of a mile of Plaintiffs' road crossing the Crown Zellerbach Tract." [49]

#### VI.

That paragraph XIX on page 5 be stricken and deleted and that there be substituted therefor the following, to-wit:

"In the condemnation action, Civil 1729, on November 21, 1944, the value of Plaintiffs' interest in the entire 18/10 miles of road including the Plaintiffs' interest in the 6/10 miles of a road crossing the Crown Zellerbach Tract was submitted, considered and decided by the jury."

#### VII.

That paragraphs XX, XXI and XXII on page 5 be stricken.

#### VIII.

That there be added to the findings of fact the following paragraph, to-wit:

"That the cost of the entire mile and 8/10 of a mile of road built by Plaintiff was \$10,190, \$1190 of which was paid by Plaintiff for easements crossing the Gossler and Crocker Tracts, that the Crown Zellerbach Section of the road is 6/10 of a mile in length, that the cost to Plaintiff of said 6/10 of a mile of road was \$3,000.

## IX.

That there be added to the findings of fact the following paragraph, to-wit:

“Plaintiffs received \$3000 from Strong and McDonald for the use of their road; they received \$1000 in the Gossler condemnation case and \$374 as the fair market value of Plaintiffs’ own use of the road, total \$4,374,  $\frac{1}{3}$  of which, or \$1458 should rightly be apportioned to the Crown Zellerbach Section of the road, with the result that the sum of \$1542 is the amount of road costs which Plaintiffs have not heretofore recovered.

## Conclusions of Law

The defendants further move that the proposed conclusions of law as submitted by the Plaintiff be amended as follows, to-wit:

## I.

That paragraphs I, II, III, IV and V of Conclusions of law be stricken and that the following be substituted therefor: [50]

## I.

“That the Stipulation of parties and the verdict of the jury in the condemnation action, Civil 1729 bars any recovery by plaintiff for use by defendant subsequent to June 18, 1942, of the Crown Zellerbach portion of Plaintiffs’ road.

## II.

“That judgment should be entered herein in favor of defendant and that plaintiff take nothing by this action.

Dated at Portland, Oregon, this 11th day of April, 1947.

HENRY L. HESS,  
United States Attorney  
for the District of Oregon.

/s/ EDWARD B. TWINING,  
Assistant United States  
Attorney.

United States of America,  
District of Oregon—ss.

Due and legal service of the within Motion is hereby accepted within the State and District of Oregon, on the 11th day of April, 1947, by receiving a copy thereof duly certified to as true and correct copy of the original by Edward B. Twining, Assistant United States Attorney for the District of Oregon.

HAMPSON, KOERNER,  
YOUNG & SWETT,

By CLARENCE J. YOUNG,  
Attorney for Plaintiff.

[Endorsed]: Filed April 11, 1947. [51]

[Title of District Court and Cause.]

### ORDER

The motions of Defendant to amend the findings and conclusions and for a new trial came on regularly before the undersigned judge of the above entitled court on Monday, May 5, 1947, at 11 o'clock a.m. Plaintiffs appeared by and through James C. Dezendorf, of their attorneys. Defendant appeared by and through Edward B. Twining, Assistant United States Attorney. Following arguments of counsel, the court took the matter under advisement. Due consideration having been given to the motions and the court being now fully advised.

It Is Hereby Ordered that Defendant's motions to amend the findings and conclusions and for a new trial be and the same hereby are denied in all respects.

Dated at Portland, Oregon, this 22nd day of May, 1947.

CLAUDE McCOLLOCH,  
District Judge.

State of Oregon,  
County of Multnomah—ss.

Service of the foregoing Order by copy, as prescribed by law is hereby admitted, at Portland, Oregon, this 6th day of June, 1947.

EDWARD B. TWINING,  
Asst. U. S. Atty.,  
Attorney for Defendant.

[Endorsed]: Filed June 7, 1947. [52]



[Title of District Court and Cause.]

### NOTICE OF APPEAL

To J. H. Gallagher, J. Ira McNutt and Earl L. McNutt, Plaintiffs above named, and James C. Dezendorf, their attorney:

You and each of you, will please take notice that the defendant, United States of America, appeals to the United States Circuit Court of Appeals for the Ninth Judicial District from that certain judgment in the above entitled cause made and entered on the 4th day of April, 1947, by the Honorable Claude McColloch, Judge of the above-entitled court, wherein the plaintiffs recovered judgment against the defendant in the sum of \$5,816.00, and defendant appeals from the order made and entered on the 22nd day of May, 1947, by the Honorable Claude McColloch in connection with said judgment denying defendant's Motion for New Trial and for Amendment of Findings of Fact, Conclusions of Law and Judgment.

HENRY L. HESS,  
United States Attorney  
for the District of Oregon.

By /s/ EDWARD B. TWINING,  
Assistant United States  
Attorney.

[Endorsed]: Filed Aug. 19, 1947. [53]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD  
ON APPEAL

The United States of America, appellant in the above entitled case, designates the complete record and all of the proceedings and evidence, including exhibits to the complaint, to be included in the record on appeal.

Respectfully submitted,

/s/ HENRY L. HESS,

United States Attorney

for the District of Oregon.

United States of America,

District of Oregon—ss.

I, Edward B. Twining, Assistant United States Attorney for the District of Oregon, hereby certify that I have made service of the foregoing Designation of Record on Appeal on the Plaintiffs herein, by depositing in the United States Post Office at Portland, Oregon, on the 22nd day of August, 1947, a duly certified copy thereof, enclosed in an envelope, with postage thereon prepaid, addressed to James C. Dezendorf, Attorney at Law, Pacific Building, Portland, Oregon, Attorney for Plaintiffs.

/s/ EDWARD B. TWINING,

Assistant United States

Attorney.

[Endorsed]: Filed Aug. 22, 1947. [54]

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE  
RELIED UPON

The United States of America, defendant-appellant, makes the following statement of points on which it will rely on appeal:

(1) The district court erred in not holding that the entire interests of the plaintiffs-appellees in the road were adjudicated in the condemnation action, *United States vs. Gossler et al.*, Civil No. 1729, and that they are estopped from maintaining this action for the fair market value of the use of the road.

(2) The district court erred in holding that the claim presented herein for the reasonable and fair market value of the use by the Government of the road belonging to plaintiffs-appellees was not submitted, considered or fully decided in the case of *United States vs. Gossler et al.*, Civil No. 1729.

(3) The district court erred in holding that the plaintiffs-appellees have a valid claim against the United States for the reasonable and fair market value of its use for hauling 66,643 cubic yards of sand and gravel over the road. [55]

(4) The district court erred in holding that the circumstances under which the United States used the road were such as to warrant the implication of a contract to pay the reasonable and fair market value of the use thereof.

(5) The district court erred in rendering a judgment in favor of plaintiffs-appellees based on the cost of construction of the entire road, less the amount previously received for the use, as the reasonable and fair market value of the use of one-third of the road for hauling 66,643 cubic yards of sand and gravel.

(6) The district court erred in admitting evidence of the construction cost of the entire road.

(7) The district court erred in ignoring the undisputed evidence that the portion of the road included in the pleadings could not have cost in excess of \$3,000.

(8) The district court erred in giving judgment of \$5,816 for the use by defendant-appellant in hauling 66,643 cubic yards of sand and gravel over .6 mile of road.

HENRY L. HESS,

United States Attorney.

/s/ EDWARD B. TWINING,

Assistant United States  
Attorney.

United States of America,  
District of Oregon—ss.

Service of the within Statement of Points to Be Relied Upon is hereby accepted within the State and District of Oregon, on the 4th day of September, 1947, by receiving a copy thereof duly certified to as a true and correct copy of the original by Edward B. Twining, Assistant United States Attorney for the District of Oregon.

/s/ JAMES C. DEZENDORF,  
Of Attorneys for Plaintiffs.

[Endorsed]: Filed Sept. 4, 1947. [56]

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[Title of District Court and Cause.]

ORDER TRANSMITTING ORIGINAL  
EXHIBITS

On Motion of the Defendant, and appellant, herein, and good cause appearing therefor, it is hereby ordered,

That all of the original exhibits in the above case be transmitted to the Circuit Court of Appeals, in connection with the appeal of this case.

Dated this 12th day of September, 1947.

CLAUDE McCOLLOCH,  
Judge.

[Endorsed]: Filed Sept. 12, 1947. [57]



[Title of District Court and Cause.]

DOCKET ENTRIES

1946

Aug. 23—Filed complaint.

Aug. 23—Issued summons, to marshal.

Aug. 28—Filed summons with Marshal's return.

Oct. 29—Filed stipulation for order extending time to answer.

Oct. 29—Filed and entered order extending time to answer (30 days after Oct. 26). McC.

Dec. 2—Filed stipulation for order allowing deft. 30 days from Nov. 26 to appear.

Dec. 2—Filed and entered order allowing deft. 30 days from Nov. 26 to appear. McC.

Dec. 23—Filed motion to dismiss.

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Jan. 13—Entered order continuing motion to dismiss to time of pre-trial hearing. McC.

Jan. 15—Filed answer.

Jan. 31—Entered order setting for pre-trial on Feb. 10, 1947. McC.

Feb. 7—Filed defendant's motion for judgment on pleadings.

Feb. 10—Entered order reserving deft's. motion for judgment on the pleadings to the time of trial, pre-trial hearing had and order setting for trial on March 11, 1947, 10 a.m. notified. McC.

Feb. 17—Entered order resetting for trial on March 18, 1947, notified. McC.

Feb. 21—Entered order resetting for trial on March 19, 1947, notified. McC.

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Mar. 5—Filed praecipe, U. S. Atty., 2 subpoenas.

Mar. 5—Issued 2 subpoenas—to marshal.

Mar. 17—Filed supoena with return.

Mar. 19—Record of trial before court and order taking under advisement. McC.

Mar. 20—Filed subpoena with marshal's return.

Mar. 19—Filed and entered pre-trial order. McC.

Mar. 21—Filed exhibits 1 to 5 inclusive (in file).

Mar. 21—Filed memorandum opinion. McC.

Apr. 3—Filed objections of deft. to proposed findings and conclusions.

Apr. 4—Filed and entered Findings of Fact, Conclusions of Law and Judgment notices. McC.

Apr. 11—Filed defendant's motion for a new trial, etc.

May 5—Record of hearings on motion for a new trial, to amend findings, etc., argued and taken under advisement. McC.

May 22—Filed transcript of proceedings of March 19 and May 5, 1947.

May 22—Entered order denying motion for a new trial and for amendment of Findings of Fact, Conclusions of Law and Judgment notices. McC.

June 7—Filed above order.

July 5—Filed judgment roll.

Aug. 19—Filed notice of appeal by U. S. [58]

Aug. 19—Mailed copy notice of appeal to Attorney Harris at Eugene, Ore., and copy to Koerner, Young & Swett, Portland, Ore.

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Aug. 22—Filed designation of contents of record.

Sept. 4—Filed statement of points to be relied upon.

Sept. 12—Filed and entered order transmitting original exhibits to circuit court of appeals. McC. [59]

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### CLERK'S CERTIFICATE

United States of America,  
District of Oregon—ss.

I. Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 60 inclusive, constitute the transcript of record upon the appeal from a judgment of said Court in a cause therein numbered Civil 3242 in which United States of America is defendant and appellant and J. H. Gallagher, J. Ira McNutt and Earl L. McNutt are plaintiffs and appellees; that said transcript has been prepared by me in accordance with the designation of contents of the record on appeal filed by the appellant and in accordance with the rules of Court; that I have compared the foregoing transcript with the original record thereof and that it is a full, true and correct transcript of the record and proceedings had in said Court in said cause, in accordance with the said designation, as the same appears of record and on file at my office and in my custody.

I further certify that I have enclosed a duplicate transcript of proceedings dated March 19 and May 5, 1947, and original exhibits 1 to 5 inclusive.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court in Portland, in said District, this 19th day of September, 1947.

[Seal]                      LOWELL MUNDORFF,  
Clerk.

By /s/ F. L. BUCK,  
Chief Deputy [60]

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In the District Court of the United States  
for the District of Oregon

Civil No. 3242

J. H. GALLAGHER, J. IRA McNUTT and  
EARL L. McNUTT,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendants.

### TRANSCRIPT OF PROCEEDINGS

Portland, Oregon, March 19, 1947

Before: Honorable Claude McColloch,  
Judge.

#### Appearances:

Mr. James C. Dezendorf (Koerner, Young, Swett & McColloch), of attorneys for plaintiffs.

Mr. Edward B. Twining, Assistant United States Attorney, attorney for defendant.

Mr. Linus M. Fuller, Special Assistant United States Attorney, attorney for defendant.

Court Reporter: Ira G. Holcomb. [1\*]

Mr. Dezendorf: May it please the Court, I would like to hand up the proposed pre-trial order which, as I understand, is agreeable to the Government. I did not have it clipped together before I came up here because there were two pages which had to be inserted after I got up here. I left the end of the order open because I did not know whether the Government had any exhibits which it proposed to introduce. It will be satisfactory with me, and I assume with opposing counsel, that the order may be completed when the exhibits are made known and identified. The issues and admitted facts are set forth, however, in the order.

Mr. Twining: That is right.

The Court: I will sign it. You may complete it later.

Mr. Dezendorf: I haven't the place yet typed for signatures, but will complete it.

The Court: It may be deemed signed as of now.

Mr. Dezendorf: There is referred to in the pre-trial order, as Plaintiffs' Exhibit No. 1, the contract between the Crown Zellerbach Corporation and

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\* Page numbering appearing at top of page of Reporter's certified Transcript of Record.



the Government of November 18, 1942, which I would like to have identified and which I would like to offer in evidence at this time.

Mr. Twining: No objection.

(Agreement between Crown Zellerbach Corporation and the United States of [2] America, dated November 18, 1942, thereupon received in evidence and marked Plaintiffs' Exhibit No. 1.)

### PLAINTIFFS EXHIBIT No. 1

[Letterhead Crown Zellerbach Corporation]

November 18, 1942.

Colonel Gordon H. McCoy,  
Post Commander, Camp Adair,  
Camp Adair, Oregon.

Dear Colonel McCoy:

Permission is hereby granted the U. S. Army to remove river-run sand and gravel from our property along the Willamette River in Section 35, Township 9 South, Range 4 West of the W.M., Polk County, Oregon, for the duration of the present war emergency at a price of 2.5c per cubic yard.

It should be understood, of course, that the rights of Mr. J. H. Gallagher of Corvallis, Oregon under an agreement of April 11, 1942 between the said Gallagher and the undersigned Corporation, a copy of which agreement is in your possession, will be protected. You are advised, however, that Mr. Gal-

lagher has not staked out on the ground any areas from which he intends to remove yardage to maintain his stock piles or fill contract requirements and we therefore consider that you would be free to take material from any part of the area covered by the gravel and sand deposit except that portion on which Mr. Gallagher's screening structure is located and/or the areas covered by his stock piles of screened material.

If this offer has your acceptance, we understand that requisitions will be placed with our Corporation as material may be required and that payment for the material will be based upon yardage removed either by cross-sectioning the area or by a yardage calculation based upon the truck loads hauled. Either method of calculating the quantity will be satisfactory to us.

If the above is satisfactory and you feel free to do so, we shall appreciate your acceptance on the duplicate of this letter and the return of such duplicate to us.

Appreciating the courtesies extended by yourself, Major E. A. Shafer and Captain C. B. Forsman on the occasion of the writer's visit to Camp Adair yesterday, we are

Very truly yours,

CROWN ZELLERBACH  
CORPORATION,

By /s/ J. R. FRUM,

Assistant Vice-President.

J. R. Frum/H

Accepted this 19th day of November, 1942. For the Post Commander.

By /s/ CARL B. FORSMAN,  
Capt. F. A.,  
Asst. Executive Officer.

[Endorsed]: Filed U.S.C.C.A. Sept. 22, 1947.

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Mr. Dezendorf: The issues are fairly well defined by the pre-trial order and, for the purpose of getting the issues before your Honor, I would like to summarize briefly the agreed facts.

This, of course, is an action under the Tucker Act, brought by Mr. Gallagher and the McNutt brothers, Gallagher residing in Corvallis and the McNutt brothers in Eugene.

On or about the 11th day of April, 1942, the plaintiff, Gallagher, entered into an agreement with the Crown Zellerbach Corporation, a copy of which is attached to the complaint. At this point, do you think it would be advisable to put in the record the original of the contract? It was in the other case.

Mr. Twining: The contract between Crown Zellerbach and Gallagher?

Mr. Dezendorf: Yes. I can produce it later. This contract permitted Gallagher to take sand and gravel from the so-called Santiam Bar and to construct a road on land owned by the Crown Zellerbach Corporation in order to get the gravel to the county road. There are also two other ownerships

between the bar and the road, one being the Gossler land and the other the Crocker land.

Appropriate easements were obtained by Gallagher from the Crockers and the Gosslers and the road was then constructed from the bar to the county road.

On June 18, 1942, which was after the road had been built, by an appropriate order in proceedings filed in this court, the Government was granted possession of the Crocker and Gossler land, but not of the Crown Zellerbach land. It was not requested and was not allowed. No order of possession was ever entered as to the Crown Zellerbach portion of the road.

On October 5th, appropriate declarations of taking were filed in the condemnation action brought to acquire the Gossler and Crocker lands. Mr. Gallagher was joined as a defendant in the Gossler case and, thereafter, the McNutt brothers intervened in that action, but neither the plaintiff Gallagher nor the plaintiffs McNutt were made parties defendant in the Crocker case, although there was an assignment of record in favor of Gallagher.

On November 21, 1944, the action to assess the value of Gallagher's and McNutt brothers' interest in the Gossler land came on for trial. The pre-trial order contains the exact stipulation that was then entered into between counsel representing the Government and counsel representing Gallagher and McNutts. I think it might be well to read it. [4]  
It is very short.



“Mr. Falk: May it please the Court—I will say this, Mr. Dezendorf, I stated yesterday, not in the presence of the Reporter—and it may be that your purpose was to have a record—that so far as the Government is concerned I believe that testimony in this case showing the value of the entire road is proper, that I will not object to any testimony showing the value of the entire road.

“Mr. Dezendorf: That does not go quite as far as we went yesterday, and perhaps, now that we have a Reporter here, we had better get a clear understanding on it. So far as these defendants are concerned, we are willing to try, all in this one lawsuit, the value of the road and of our interest in the gravel bar. In other words, technically, you probably have only taken in this proceeding a portion of our road and probably will be limited to that if you wish to, but we are willing to try the whole interest of the value of the road and of the gravel in this one lawsuit.

“Mr. Falk: I am, Mr. Dezendorf, willing to try the value of your interest in the entire road and the value of your interest in the gravel bar, and that is what I expected would be tried.

“The Court: Well, that relieves the Court of some of the responsibility, because with this stipulation I take it that the parties can stipulate to try any questions that [5] they want to. This is a stipulation to try out certain questions which may not technically be in the case, and I



shall treat it as that. As to the other question, my mind is not made up. I will have to make it up when the testimony is offered.”

On November 24th, the third day of trial, the jury returned a verdict on which judgment was entered in favor of Gallagher and McNutt brothers for \$1,000.

At this point, I would like to refer to the Court's instructions which have been transcribed. I do not know whether they are a part of this record or not, but I would be willing to make my copy available for that purpose, if it is needed.

Under the instructions the only question which was submitted, as I interpret it, was the value of the Gallagher and McNutt brothers' interest in the Gossler and Crocker lands, not in the Crown Zellerbach land. Referring to the instructions to the jury, the following appears:

“On June 18, 1942, the Government took the Crocker and Gossler lands and the Gallagher and the McNutt brothers' interest therein. As a result of this taking of these interests the United States is required to pay just compensation.”

Then, the Court went on to define what fair market value is and, on page 6 of the instructions the Court said [6] this: “The sole consideration for you is the fair market value of the Gallagher and McNutt property interests. You will, then, not take into consideration in your deliberations the cost of construction of the road over either of the pieces of property, or the purchase price of the right-of-way,

but only the fair market value of the interest of McNutt and Gallagher as of the date June 18, 1942."

Because Judge Harris and I felt that the issues which we intended to be tried were not submitted, we filed a motion for a new trial following judgment and the verdict, and Judge Fee rendered an opinion on April 2, 1945, denying the motion for new trial but leaving open the question as to whether the interests of Gallagher and the McNutts in the Crown Zellerbach Corporation portion of the road had actually been acquired, leaving that question open for determination in another lawsuit.

Also, at the time the motion for the new trial was argued, Judge Fee made this statement—this is on December 18, 1944—"I think the Court will not pass on the question whether or not the Tucker Act cases were involved in this matter, and whether the verdict was on those cases or not. That would be a question in another lawsuit."

Then, referring to the Gossler case, the Court said: "As I take it, that involved simply the trial as to the value of this easement over a particular piece of land. [7] \* \* \* It is true that the Court did not submit to the jury the value of the easement over other lands, because of the fact that if you did not have an easement over this land you were not entitled to be paid."

I confess it has been a little bit difficult for me to understand exactly what Judge Fee had in mind. However, from the opinion on motion for a new trial and what he said at the time, following the conclusion of the motion for new trial, it appeared to

Judge Harris and to me that the question of the amount, if any, which Gallagher and the McNutt brothers were entitled to recover for the use which the Government made of the Crown Zellerbach land was still open for consideration.

The admitted facts will show—and they are contained in the pre-trial order—that Gallagher and the McNutt brothers hauled out over their road only 3,740 cubic yards of gravel; between July 1, 1942, and September 16, 1942, Strong & McDonald moved 68,203 cubic yards of sand and gravel over the road and paid to Gallagher \$3,000 for that use; between October 1, 1942, and August 19, 1944, the Government moved 62,643 cubic yards of sand and gravel from the Santiam Bar over plaintiffs' road and paid the plaintiffs nothing for its use of the road.

The contract between the Government and the Crown Zellerbach Corporation, dated November 18, 1942, which was [8] about the time the Government started to haul gravel out over this road, is very interesting.

It is addressed to Colonel Gordon H. McCoy, Post Commander, Camp Adair, Oregon, and reads:

“Dear Colonel McCoy:

“Permission is hereby granted the U. S. Army to remove river run sand and gravel from our property along the Willamette River,” and then describing the property, which is the Santiam Bar.

“It should be understood, of course, that the rights of Mr. J. H. Gallagher of Corvallis, Oregon, under an agreement of April 11, 1942, between the said Gallagher and the undersigned corporation, a copy of which agreement is in your possession, will be protected.”

Then the letter goes on to say: "If this offer has your acceptance, we understand that requisitions will be placed with your corporation as material may be required and that payment for the material will be based upon yardage removed either by cross-sectioning the area or by a yardage calculation based upon the truckloads hauled," and so forth.

This document contains the following: "Accepted this 19th day of November, 1942. For the Post Commander: By Carl B. Forsman, Captain F. A., Asst. Executive Officer."

The original contract of April 11, 1942, between the Crown Zellerbach Corporation and Gallagher contains this [9] provision which, in my judgment, supports the present claim for use by the Government of the road. This is sub-paragraph 4 of the agreement between Crown Zellerbach Corporation and Gallagher:

"As part consideration for the sand and gravel purchased hereunder by the purchaser, the purchaser hereby agrees that the seller or its assigns shall have the right to use any private roads constructed by or used by the purchaser for obtaining the sand and gravel purchased hereunder; it being understood that such private roads shall be available to the sellers and any persons, firms or corporations to whom the seller may sell sand and gravel from the herein described property, provided the seller and/or such persons, firms or corporations shall reimburse the purchaser on some reasonable basis for the use of such private



roads; such reimbursement to beat a reasonable royalty rate on a per-cubic-yard basis which would not be greater than a fair share or proportionate cost of constructing and maintaining such private road or roads, taking into consideration the yardage of sand and gravel being hauled by the purchaser and the yardage of sand and gravel to be hauled by the seller or such persons, firms or corporations to whom it might sell sand and gravel.”

The contract between the Crown Zellerbach Corporation and the Army shows that the Army had a copy of this [10] April 11, 1942, contract in its possession at the time it went into the gravel bar and moved out the gravel over Gallagher and McNutt brothers' road.

The only issue which remains, as I see it, in addition to the legal questions that are framed by the pre-trial order, is to show the cost of the road and to provide testimony as to the reasonable and fair market value of the use of the road such as was made by the Army, and we are prepared to put in that testimony at this time.

Mr. Twining: May I offer, as a Government's exhibit, the Judgment on the Verdict in Civil Case No. 1729, as well as final Judgment in Condemnation. Both are certified copies.

Mr. Dezendorf: No objection.

The Court: Admitted.

(Certified copy of Judgment on the Verdict, Civil No. 1729, thereupon received in evidence and marked Defendant's Exhibit No. 2.)



## DEFENDANT'S EXHIBIT No. 2

In the District Court of the United States,  
for the District of Oregon

Civil No. 1729

UNITED STATES OF AMERICA,

Plaintiff,

vs.

L. M. GOSSLER and ALTA L. GOSSLER, husband and wife; F. E. GALBREATH; J. J. OBERSON; J. H. GALLAGHER and JANE DOE GALLAGHER, whose true name is Belle K. Gallagher, his wife; POLK COUNTY, a municipal corporation and political subdivision of the State of Oregon,

Defendants.

EARL L. McNUTT and J. IRA McNUTT, co-partners doing business under the firm name and style of McNutt Bros.,

Intervening Defendants.

Judgment on the Verdict

This cause coming on regularly for trial on the 21st day of November, 1944, plaintiff appearing by Carl C. Donough & William M. Langley, Asst. U. S. Atty. and Ernest Falk and Linus M. Fuller, Special Attorneys, Department of Justice, and the defendants J. H. Gallagher and Belle K. Gallagher, his wife, Earl L. McNutt and J. Ira McNutt appear-

## Defendant's Exhibit No. 2 (Continued)

ing by their attorneys Lawrence T. Harris, Hampson, Koerner, Young and Swett and James C. Dezen-dorf, and it having been orally stipulated that the jury in this case should determine not only the value of the road across the property described in this proceeding as Tract No. C-10, but also the value of the interest of defendants J. H. Gallagher and Belle K. Gallagher, his wife, Earl L. McNutt and J. Ira McNutt in and to the entire 1.8 miles of road leading from the county road across property formerly owned by A. W. Crocker and Agnes M. Crocker and described as Tract No. C-23 as set out in the case of the United States vs. O. C. Simpson, et al., Civil No. 1111, and across the above mentioned Tract No. C-10, and across adjoining land owned by Crown-Zellerbach Corporation to the site of the Santiam Bar, and also the value of said defendants' interest in and to said Santiam Bar under a contract with Crown-Zellerbach Corporation dated April 11, 1942; a jury was impaneled and sworn to try the issues in this cause and on order of the Court the jury viewed the said roadway across the Crocker property and across the Gossler property sought to be acquired by the United States by and through this proceeding and across the Crown-Zellerbach Corporation's property, and further viewed the Santiam Bar; and the jury, after hearing the testimony of witnesses for the plaintiff and for the defendants, argument of counsel and the instructions of the Court, did retire for deliberation and after deliberation did on

Defendant's Exhibit No. 2 (Continued)  
the 24th day of November, 1944, return into this  
Court a verdict in words and figures as follows:

“In the District Court of the United States,  
for the District of Oregon

Civil No. 1729

UNITED STATES OF AMERICA,  
Plaintiff:,

vs.

L. M. GOSSLER, et al.,  
Defendants,

EARL L. McNUTT, et al.,  
Intervening Defendants.

Verdict of the Jury

We, the jury, duly empaneled and sworn to try the above entitled cause, do hereby find that the full market value of defendants J. H. Gallagher, Belle K. Gallagher, his wife, Earl L. McNutt and J. Ira McNutt's interest in 1.8 miles of road leading to the Santiam Bar and including damage to their interest in said bar, which interest exists under a contract from Crown-Zellerbach arising from this proceeding, as of June 18, 1942, was and is the sum of One thousand - - - - Dollars (\$1,000.00), said roadway crossing, among other lands, a tract formerly owned by L. M. Gossler and Alta L. Gossler, his wife.

Dated this 24th day of November, 1944.

JOHN E. MONTGOMERY,  
Foreman.”

## Defendant's Exhibit No. 2 (Continued)

And It Appearing to the Court that the full amount deposited in the Registry of this Court in this cause heretofore has, pursuant to Order of this Court, been distributed and that there are no funds on deposit in the Registry of the Court to pay or satisfy the judgment hereinafter ordered and that the judgment obtained herein should bear interest at the rate of six per cent per annum from June 18, 1942, the date upon which this court entered an order granting to the United States of America immediate possession of the hereinafter described lands and also of Tract No. C-23, until paid: Now, Therefore, by virtue of the law and by reason of the premises and the verdict, It Is Hereby Considered, Ordered and Adjudged that upon payment into the Registry of this Court of the sum of \$1,000.00, together with interest at the rate of six per cent per annum from June 18, 1942, until paid, a judgment and decree of this Court shall be entered herein appropriating and condemning for the use and purpose of the plaintiff, United States of America, as set forth in the Complaint in Condemnation herein and in the Declaration of Taking in United States vs. George J. Amort, et al., Civil No. 1481, the full fee simple title in and to the lands described in said Declaration of Taking and in said Complaint in Condemnation as Tract No. C-10 and more particularly described as follows:

Tract No. C-10:

Beginning at the Northeast corner of Lot No. 9 in Section 2, in Township 10 South, Range 4 West



## Defendant's Exhibit No. 2 (Continued)

of the Willamette Meridian, and running thence West along the North line of said Lot and Section to the East bank of the Luckiamute River; thence along said bank of said river following the meanders thereof, upstream, to a point from which a line running East to the West line of the Donation Land Claim of Isaac N. Miller, Claim No. 52 in said Township and Range, and thence North  $29^{\circ} 15'$  East to the place of beginning, will, with the other lines above described, include 38 acres, and from said point running East to the West line of said Donation Land Claim; and thence north  $29^{\circ} 15'$  East on the West line of said Donation Land Claim to the place of beginning, being a part of the Donation Land Claim of Thomas Bowers in Polk County, Oregon.

Also, beginning at a point which is 40.06 chains North  $29^{\circ} 15'$  East from a point 18.84 chains East and 6.87 chains North of the quarter section corner on the line between Sections 3 and 10 in Township 10 South, Range 4 West of the Willamette Meridian, in Polk County, Oregon, said beginning point being on the West boundary line of the Donation Land Claim of Isaac N. Miller, Claim No. 52 in Township 10 South, Range 4 West of the Willamette Meridian; thence running South  $55^{\circ}$  East 14.00 chains; thence South  $16^{\circ}$  West 7.50 chains; thence East 12.05 chains to the West bank of the Willamette River; thence down said river on the West bank thereof, following the East boundary line of said Donation Land Claim to the Northeast corner of



## Defendant's Exhibit No. 2 (Continued)

said Donation Land Claim; thence West along the North line of said Donation Land Claim 52.68 chains; thence South  $29^{\circ} 15'$  West along the West line of said Donation Land Claim to the place of beginning, in the County of Polk, State of Oregon.

Beginning at a point 6.38 chains East of the Northwest corner of the Southwest quarter of the Southwest quarter of Section 35 in Township 9 South, Range 4 West of the Willamette Meridian in Polk County, Oregon, and running thence South 13 chains; thence East 17 links to the West bank of the Luckiamute River; thence up said river following the meanderings thereof, South  $15^{\circ}$  East 4.70 chains; and South  $29^{\circ}$  East 2.70 chains to the South boundary line of said Section; thence East 11 chains to the Southeast corner of the Southwest quarter of the Southwest quarter of said Section; thence North 20 chains to the Northeast corner of the Southwest quarter of the Southwest quarter of said section and thence West 13.62 chains to the place of beginning, in the County of Polk, State of Oregon, and containing 297.45 acres, more or less.

subject, however, to existing easements for public roads and highways, for public utilities, for railroads, for pipe lines and for water and sewage systems; the value of all other interests in and to said property having heretofore been determined and compensation therefor paid by Order entered herein May 4, 1944;

## Defendant's Exhibit No. 2 (Continued)

Dated this 24th day of November, 1944, at Portland, Oregon.

/s/ JAMES ALGER FEE,  
District Judge.

[Seal]

A true copy, Lowell Mundorff, Clerk.

By /s/ J. CASE,  
Deputy Clerk.

[Endorsed]: Filed December 4, 1944. Lowell Mundorff, Clerk; By R. DeMott, Deputy.

[Endorsed): Filed U.S.C.C.A., Sept. 22, 1947.

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(Certified copy of Order Disbursing Funds and Final Judgment in Condemnation, Civil No. 1729, thereupon received in evidence and marked Defendant's Exhibit No. 3.)

DEFENDANT'S EXHIBIT No. 3

In the District Court of the United States,  
for the District of Oregon

Civil No. 1729

UNITED STATES OF AMERICA,

Plaintiff,

vs.

L. M. GOSSLER and ALTA L. GOSSLER, husband and wife; F. E. GALBREATH; J. J. OBERSON; J. H. GALLAGHER and JANE DOE GALLAGHER, his wife, if married; Polk County, a municipal corporation and political subdivision of the State of Oregon;

Defendants,

EARL L. McNUTT and J. IRA McNUTT, co-partners doing business under the firm name and style of McNutt Bros.,

Intervening Defendants.

ORDER DISBURSING FUNDS AND FINAL  
JUDGMENT IN CONDEMNATION

This matter coming on upon the motion of the plaintiff, United States of America, by and through its attorneys of record, for an order disbursing funds and final judgment in condemnation, and It Appearing to the Satisfaction of the Court that this proceeding was instituted in accordance with and

## Defendant's Exhibit No. 3 (Continued)

under the authority of the following Acts of Congress: The Act of August 1, 1888 (25 Stat. 357, 40 U.S.C. Sec. 257), Act of February 26, 1931 (46 Stat. 1421, 40 U.S.C. Sec. 258a) and Acts supplementary thereto and amendatory thereof, Act of August 18, 1890 (26 Stat. 316) as amended by the Acts of July 2, 1917 (40 Stat. 241), April 11, 1918 (40 Stat. 518, 50 U.S.C. Sec. 171), and March 27, 1942 (Public Law 507—77th Congress), and the Act of April 28, 1942 (Public Law 528—77th Congress), and that the Secretary of War of the United States has selected the hereinafter described lands for acquisition by the United States of America for use in connection with the establishment of a military training camp known as Camp Adair, Oregon, and for other related military purposes, and for such other uses as may be authorized by Congress or by Executive Order, and has determined and is of the opinion that the hereinafter described lands are necessary and adequate to provide for the establishment of a military training camp and for related military purposes, and that said lands are required for immediate use and that it is necessary and advantageous to the interests of the United States to acquire the hereinafter described lands by condemnation under judicial process, and that by direction of the Attorney General of the United States, pursuant to the request of the Secretary of War, this condemnation proceeding was instituted pursuant to the aforementioned statutes for the purpose of



## Defendant's Exhibit No. 3 (Continued)

acquiring the estate or interest hereinafter set forth in and to the lands so selected, and It Further Appearing to the Court that funds for the acquisition of said lands were appropriated by the Act of Congress approved April 28, 1942 (Public Law 528—77th Congress), and that there was deposited in the Registry of this Court in this cause the sum of \$15,000.00 as estimated just compensation for the taking of the hereinafter described lands under the declaration of taking filed on October 5, 1942; and It Further Appearing to the Court that the defendants, L. M. Gossler and Alta L. Gossler, husband and wife, appeared herein by and through their petition for order fixing value and disbursing funds, and the defendant, Polk County, appeared by and through its answer, and the defendants, J. H. Gallagher and Belle K. Gallagher, his wife, and Earl L. McNutt and J. Ira McNutt, co-partners doing business under the firm name and style of McNutt Bros., appeared by their answers; and It Further Appearing to the Court that at the time of the filing of the declaration of taking on October 5, 1942, L. M. Gossler and Alta L. Gossler, husband and wife, were the owners in fee simple of the lands taken herein, subject to a mortgage in favor of the defendants, J. J. Oberson, subject to a mortgage in favor of defendant, F. E. Galbreath, and subject to an easement in favor of defendant, J. H. Gallagher, in and to which the defendants Belle K. Gallagher and Earl L. McNutt and J. Ira McNutt



## Defendant's Exhibit No. 3 (Continued)

had an interest; and It Further Appearing to the Court that heretofore on May 4, 1944 an order was entered, fixing the value of all interests in and to said property, except the private roadway easement conveyed by L. M. Gossler and Alta L. Gossler to J. H. Gallagher by conveyance dated March 12, 1942, pursuant to which order and pursuant to order for partial distribution of funds entered April 20, 1943, the sum of \$15,000.00 on deposit in the Registry of this Court was disbursed to defendants, Stella M. Galbreath as attorney in fact for F. E. Galbreath, J. J. Oberson, T. B. Hooker, Sheriff and Tax Collector of Polk County, and to L. M. Gossler and Alta L. Gossler; and It Further Appearing to the Court that this matter having come on for trial on November 21, 1944, to determine the value of the remaining interest in and to said property, to-wit: the private roadway easement above referred to, and the plaintiff, United States of America, and the defendants, J. H. Gallagher and Belle K. Gallagher, his wife, and Earl L. McNutt and J. Ira McNutt, co-partners doing business under the firm name and style of McNutt Bros., having stipulated in open Court by their respective counsel that the jury, upon the trial, should fix the full market value of said defendants' interest in 1.8 miles of road leading to the Santiam Bar and including damage to said defendants' interest in said Bar arising out of a contract with Crown Zellerbach Corporation, dated April 11, 1942; and

## Defendant's Exhibit No. 3 (Continued)

the jury on November 24, 1944 having returned its verdict, finding that the sum of \$1,000.00 was the full market value of defendants, J. H. Gallagher, Belle K. Gallagher, his wife, Earl L. McNutt and J. Ira McNutt's interest in 1.8 miles of road leading to the Santiam Bar and including damage to their said interest in said Bar, said road crossing, among other lands, the hereinafter described tract, and judgment having been entered on said verdict on November 24, 1944 in favor of said defendants, J. H. Gallagher, Belle K. Gallagher, his wife, Earl L. McNutt and J. Ira McNutt, for the sum of \$1,000.00, together with interest at the rate of 6 per cent per annum from June 18, 1942 until paid, and the sum of \$1,155.00 having been deposited in the Registry of the Court on January 25, 1945 in satisfaction of said judgment; and It Further Appearing to the Court that heretofore on December 7, 1944, the defendants, J. H. Gallagher and Belle K. Gallagher, his wife, and Earl L. McNutt and J. Ira McNutt, filed a motion for a new trial, and that on April 16, 1945, an order denying motion for new trial was entered; and It Further Appearing to the Court that defendants, J. H. Gallagher and Belle K. Gallagher, his wife, Earl L. McNutt and J. Ira McNutt, are entitled to receive said sum of \$1,155.00 now on deposit in the Registry of the Court; Now, Therefore, it is by the Court at this time Ordered, Adjudged and Decreed that the full fee simple title in and to the following described lands, to-wit:

## Defendant's Exhibit No. 3 (Continued)

Tract No. C-10:

Beginning at the Northeast corner of Lot No. 9 in Section 2, in Township 10 South, Range 4 West of the Willamette Meridian, and running thence West along the North line of said Lot and Section to the East bank of the Luckiamute River; thence along said bank of said river following the meanders thereof, upstream, to a point from which a line running East to the West line of the Donation Land Claim of Isaac N. Miller, Claim No. 52 in said Township and Range, and thence North  $29^{\circ} 15'$  East to the place of beginning, will, with the other lines above described, include 38 acres, and from said point running East to the West line of said Donation Land Claim; and thence north  $29^{\circ} 15'$  East on the West line of said Donation Land Claim to the place of beginning, being a part of the Donation Land Claim of Thomas Bowers in Polk County, Oregon.

Also, beginning at a point which is 40.06 chains North  $29^{\circ} 15'$  East from a point 18.84 chains East and 6.87 chains North of the quarter section corner on the line between Sections 3 and 10 in Township 10 South, Range 4 West of the Willamette Meridian, in Polk County, Oregon, said beginning point being on the West boundary line of the Donation Land Claim of Isaac N. Miller, Claim No. 52 in Township 10 South, Range 4 West of the Willamette Meridian; thence running South  $55^{\circ}$  East 14.00 chains; thence South  $16^{\circ}$  West 7.50 chains; thence East 12.05 chains to the West bank of the Willamette

## Defendant's Exhibit No. 3 (Continued)

River; thence down said river on the West bank thereof, following the East boundary line of said Donation Land Claim to the Northeast corner of said Donation Land Claim; thence West along the North line of said Donation Land Claim 52.68 chains; thence South  $29^{\circ} 15'$  West along the West line of said Donation Land Claim to the place of beginning, in the County of Polk, State of Oregon.

Beginning at a point 6.38 chains East of the Northwest corner of the Southwest quarter of the Southwest quarter of Section 35 in Township 9 South, Range 4 West of the Willamette Meridian in Polk County, Oregon, and running thence South 13 chains; thence East 17 links to the West bank of the Luckiamute River; thence up said river following the meanderings thereof, South  $15^{\circ}$  East 4.70 chains; and South  $29^{\circ}$  East 2.70 chains to the South boundary line of said Section; thence East 11 chains to the Southeast corner of the Southwest quarter of the Southwest quarter of said Section; thence North 20 chains to the Northeast corner of the Southwest quarter of the Southwest quarter of said section and thence West 13.62 chains to the place of beginning, in the County of Polk, State of Oregon, and containing 297.45 acres, more or less;

vested in the United States of America on October 5, 1942, free and discharged of all liens and claims of every kind whatsoever, subject, however, to existing easements for public roads and highways, for



## Defendant's Exhibit No. 3 (Continued)

public utilities, for railroads, for pipe lines, and for water and sewage systems; and it is Further Ordered that the Clerk of this Court be and he is hereby authorized and directed to pay forthwith the sum of \$1,155.00 now on deposit in the Registry of this Court in this cause to the defendants, J. H. Gallagher and Belle K. Gallagher, his wife, Earl L. McNutt and J. Ira McNutt, co-partners doing business under the firm name and style of McNutt Bros., whose address is: Care of James C. Dezendorf, Attorney at Law, 800 Pacific Building, Portland, Oregon, in full satisfaction of said judgment and of all claims against the United States of America for the taking of the estate above set forth in and to the above described lands, without charging commission or poundage fees thereon, and that said Clerk take the receipt of said defendants therefor.

/s/ JAMES ALGER FEE,

District Judge.

Dated this 14th day of May, 1945, at Portland, Oregon.

A true copy.

[Seal]

LOWELL MUNDORFF,

Clerk.

By /s/ J. CASE,

Deputy Clerk.

[Endorsed]: Filed May 16, 1945. Lowell Mundorff, Clerk. By R. DeMott, Deputy.

[Endorsed]: Filed U.S.C.C.A. Sept. 22, 1947.



Mr. Dezendorf: At this time, may I offer a duplicate original of the contract between Crown Zellerbach Corporation and Gallagher, dated April 11, 1942, and the original agreement between McNutt brothers and Gallagher, which establishes their joint interest.

Mr. Twining: No objection.

The Court: Admitted.

(Duplicate original of contract between Crown Zellerbach Corporation and J. H. Gallagher, dated April 11, 1942, thereupon received in evidence and marked Plaintiff's Exhibit No. 4.)

#### PLAINTIFFS' EXHIBIT No. 4

This Agreement, Made and entered into this 11th day of April, 1942, by and between Crown Zellerbach Corporation, a corporation of the State of Nevada, whose principal business is that of manufacturing paper, hereinafter called the "Seller," and J. H. Gallagher of Corvallis, Oregon, hereinafter called the "Purchaser,"

Witnesseth:

That parties hereto, each in consideration of the agreements and the performance thereof on the part of the other, do agree:

1. Easements to Obtain Sand and Gravel: Subject to the terms and conditions hereof and subject to the Purchaser commencing active operations hereunder within Ninety (90) days from the date

Plaintiffs' Exhibit No. 4—(Continued)  
of this agreement, the Seller hereby grants the Purchaser the right and privilege of taking sand and gravel from the following describe property:

A parcel of land in Township 9 South, Range 4 West of the Willamette Meridian, Polk County Oregon, more particularly described as follows, to-wit:

Beginning at a point Twenty (20) Chains due East on the Township line from the Southwest corner of Section 35 and running thence East to the West boundary line of Isaac N. Miller's D.L.C.; thence Northeasterly along the West boundary line of said claim to Northwest corner thereof; thence East along the North boundary line of said claim to the West bank of the Willamette River; thence with the meanderings of said river to the mouth of the Luckimute River; thence up the South bank with the meanderings of said river to a point due North of the place of beginning, and thence to the place of beginning, in Section 35, together with all accretion thereto which under the laws of the State of Oregon may be owned by the Paper Company.

The precise place or places from which said Purchaser shall be permitted to take sand and gravel hereunder shall be designated by the Purchaser from time to time as required by the users of the material and the areas from which sand and gravel may be taken hereunder shall be staked out upon

## Plaintiffs' Exhibit No. 4—(Continued)

the ground by the Purchaser subject to approval of the Seller, and such areas may not exceed the quantity in yardage required by the Purchaser to maintain his stock piles or fill the contract requirements of the users of such sand and gravel by more than Twenty-five (25%) Percent; in other words, it is understood by and between the parties hereto that the Seller may sell sand and gravel from the above described property to other persons, firms or corporations and that the Purchaser shall not be permitted to stake out in advance for purchase hereunder more than Twenty-five (25%) Percent in excess of the yardage which he expects to place in stock piles or sell to the users of such material within a reasonable period of time.

2. Easement for Location of Equipment and Bunkers: Subject to the terms and conditions hereof, the Seller hereby grants the Purchaser such rights of way for roads, telephone and transmission lines or other facilities as may be required upon the property together with the right and privilege of occupying and using one or more locations upon its property to be hereafter staked out upon the ground by the Purchaser with the approval of the Seller, to be used by the Purchaser for the construction and maintenance of bunkers and other improvements and/or stock piles reasonably necessary and/or convenient for the handling of sand and gravel from the lands of the Seller under the provisions of this agreement.

## Plaintiffs' Exhibit No. 4—(Continued)

3. Manner of Operation: It is expressly understood that the Purchaser, in taking said sand and gravel under the provision of this agreement, shall not needlessly interfere with the use of the adjacent property of the Seller, or with any operation of the Seller, and particularly the Purchaser shall not needlessly interfere in any manner with the operations of any other person, firm or corporation who may contract for the purchaser of sand and gravel from the hereinabove described property of the Seller immediately adjacent to or abutting upon the area staked out by the Purchaser with the approval of the Seller and from which sand and gravel is being removed hereunder by the Purchaser; nor shall the Seller or any other person, firm or corporation obtaining sand and gravel from such adjacent property, needlessly interfere with the operations of the Purchaser.

4. Use of Roads and Rights of Way: As part consideration for the sand and gravel purchased hereunder by the Purchaser, the Purchaser hereby agrees that the Seller or its Assigns shall have the right to use any private roads constructed by or used by the Purchaser for obtaining the sand and gravel purchased hereunder; it being understood that such private roads shall be available to the Seller and any persons, firms or corporations to whom the Seller may sell sand and gravel from the herein described property, provided the Seller and/or such persons, firms or corporations shall



## Plaintiffs' Exhibit No. 4—(Continued)

reimburse the Purchaser on some reasonable basis for the use of such private roads; such reimbursement to be at a reasonable royalty rate on a per cubic yard basis which would not be greater than a fair share or proportionate cost of constructing and maintaining such private road or roads, taking into consideration the yardage of sand and gravel being hauled by the Purchaser and the yardage of sand and gravel to be hauled by the Seller or such persons, firms or corporations to whom it might sell sand and gravel. In the event the purchaser is not carrying on active operations hereunder, he shall not be required to maintain his private roads for the use of others while not operating. It being understood that during such period of time, the Seller or such other persons, firms or corporations to which it may sell sand and gravel from its property shall, if using the private roads of the Purchaser, maintain such private roads in a good state of repair until such time as the Purchaser may resume active operations hereunder.

5. Price for Sand and Gravel: For each cubic yard of sand and/or gravel removed from the property of the Seller as hereinabove described, the Purchaser shall pay the Seller Eight (8c) Cents per cubic yard; such rate shall apply to both washed and/or unwashed sand and gravel whether used for road material or for other concrete construction or maintenance. Provided, however, that if the State of Oregon shall assert a claim to any of the sand



## Plaintiffs' Exhibit No. 4—(Continued)

and gravel sold hereunder, the Seller may, at its option, refund the payment made by the Purchaser for the quantity of sand and gravel claimed by the State and in this event, the Purchaser shall assume the full liability of making payment to the State of Oregon for the sand and gravel or other material removed from any property, the title to which may rest in the State of Oregon, or, if it elects so to do, the Seller may retain the amount received from the Purchaser for sand and gravel removed from land claimed by the State of Oregon and in this event the Seller shall assume the obligation of defending any suit prosecuted in the name of the State of Oregon, but in the event of a judgment in favor of the State of Oregon, the Seller shall not be obligated to pay to the State of Oregon a sum in excess of the amount received from the Purchaser for the sand and gravel or other material claimed by the State of Oregon, and the Purchaser agrees to pay to the State of Oregon any judgment in excess of the amount received by the Seller. The Purchaser shall have the privilege of joining with the Seller in the defense of any suit which may be brought in the name of the State of Oregon to collect a royalty on any of the sand and gravel or other material removed from the hereinabove described property.

6. Payment for Sand and Gravel: On or before the 10th day of each month during the term of this agreement, the Purchaser will render the Seller a

## Plaintiffs' Exhibit No. 4—(Continued)

statement of all sand and/or gravel which may have been removed by it from the land of the Seller during the preceding month based upon the tickets issued on each load of material and will remit with such statement such amount as may be due the Seller hereunder for sand and/or gravel removed during the preceding month. The Seller shall have the right to examine all books, records and accounts of the Purchaser to satisfy itself as to the accuracy of statements rendered by the Purchaser and the Purchaser hereby agrees that tickets bearing consecutive numbers will be used in maintaining a record of the quantity of sand and/or gravel removed from the property of the Seller and shall issue a numbered ticket for each load of material removed from the property; such ticket to also show the date issued and bear the signature of the truck driver or the name of the person using the material.

7. **Quality:** The quality of the sand and/or gravel sold and purchased hereunder shall conform to the specifications required for ordinary road construction ballast or for concrete use in paving, foundation work or other building construction. Any soil or other waste material not suitable for use by the Purchaser may be excavated and placed upon the adjacent land of the Seller at a location to be designated by the Seller; provided, however, that such waste material shall be spread upon the adjacent land as directed by the Paper Company. It being understood that such waste material may not be placed upon that portion of the land of the Paper

## Plaintiffs' Exhibit No. 4—(Continued)

Company not staked out by the Purchaser and from which sand and gravel may be sold to others.

8. Term: The term of this agreement shall be from date hereof to and including the 31st day of December, 1945. Provided, however, that this agreement shall automatically terminate in the event the purchaser shall fail to commence active operations hereunder on or before July 1, 1942. The Purchaser shall be presumed to have commenced active operations hereunder if he shall commence the construction of bunkers and other improvements required for the handling of sand and gravel from the lands of the Seller and shall engage in placing sand and gravel in stock piles or in making actual delivery of such material to any persons engaged in road construction, foundation work or other building construction incidental to or in connection with the so-called Albany-Corvallis Cantonment for which construction contracts are now being let by the U. S. Army Engineers. If the operations of the Purchaser hereunder are conducted satisfactory to the Seller, this agreement may be extended from year to year by mutual agreement between the parties hereto.

9. Indemnity: The Purchaser will save and hold harmless the Seller from any loss, damage, charge or expense, arising or growing out of the performance, non-performance and/or mal-performance by the Purchaser of the obligations assumed by him under this agreement, or in the performance by him of the operations contemplated hereunder.

## Plaintiffs' Exhibit No. 4—(Continued)

10. Default: Upon default of the Purchaser in the performance of any obligation by him assumed hereunder, after Thirty (30) days' notice in writing from the Seller requesting performance hereunder, the Seller may, at its discretion, cancel and terminate this agreement by declaration in writing to that effect to be served upon the Purchaser.

11. Removal of Property: Within thirty (30) days after the expiration or termination of this agreement, the Purchaser will remove his bunkers, improvements and/or personal property from the property of the Seller.

12. Taxes and Liens: The Purchaser will promptly pay any and all taxes which may be lawfully assessed and levied against any improvements of the Purchaser erected hereunder and/or against the business and/or operations of the Purchaser hereunder, and will not permit such taxes and/or assessments to become delinquent.

The Purchaser will promptly pay for all labor and material which may be employed or used in the conduct of his operations hereunder and will not suffer nor permit any lien of any kind or nature to attach to the property of the Seller by reason thereof.

13. Assignment: The Purchaser will not assign this agreement nor any interest herein, nor sublet any operation hereunder without first obtaining the consent in writing of the Seller to such assignment



## Plaintiffs' Exhibit No. 4—(Continued)

or subletting. Provided, however, that the Purchaser may assign this agreement to McNutt Brothers of Eugene, Oregon for the purpose of carrying out the provisions of said agreement but such assignment shall not be effective unless and until McNutt Brothers execute a formal agreement in favor of the Seller in which they agree to assume and carry out all of the obligations of the Purchaser hereunder. Such agreement shall incorporate all of the conditions and provisions of this agreement by reference therein and the attachment thereto of the executed counterparts of this agreement. Such agreement shall further provide that the said McNutt Brothers may not thereafter assign the agreement or any interest therein, nor sublet any operation thereunder without first obtaining the consent in writing of the Seller to such assignment or subletting.

14. This Agreement Exclusive: All other verbal and/or written agreements between the parties hereto, concerning the subject matter hereof, are hereby cancelled, terminated and held for naught, and it is expressly understood that this agreement shall be the sole and exclusive agreement between the parties, governing their relations with respect to the subject matter of this agreement. And it is further understood between the parties hereto that the rights of the Purchaser to obtain sand and gravel from the hereinabove described real property



## Plaintiffs' Exhibit No. 4—(Continued)

of the Seller is not exclusive and that the Seller retains the right to sell sand and gravel from its property to other persons, firms or corporations and the right to go upon its property for all purposes incidental thereto and may permit others to construct and maintain on its premises bunkers and other improvements reasonably necessary and/or convenient for the removal of sand and gravel, all of which may be removed over any private rights of way or roads owned by, used by or in the possession of the Purchaser and/or his successors or assigns as of or subsequent to the date of this agreement.

15. Purchaser as Independent Operator: It is understood by and between the parties hereto, that the Purchaser shall operate hereunder as an Independent Contractor and/or Operator and not as an employee of the Seller, and that any person or persons employed by the said Purchaser to aid or assist in carrying on the work under the conditions of this Agreement, shall be employes of the said Purchaser and not employes of the Seller.

(a) The Purchaser further agrees to carry on the work to be performed under this Agreement within the terms of and subject to the compensation and/or industrial insurance act of the State of Oregon, and will pay any and all sums due and payable therefor to the Commission administering such Act.

## Plaintiffs' Exhibit No. 4—(Continued)

(b) The Purchaser further agrees to pay or cause to be paid to any Federal, State, County, City, Municipal or other agency, authority or commission having jurisdiction in the premises, any compensation, fee, license, tax or other payments, including employers' and employes' payroll contribution or deduction, required to be paid by the Purchaser, his representatives, agents or employes, or by his Assigns, Sub-contractors or the representatives, agents or employes of such Assignees or Sub-contractors, under the provisions of any law, ordinance or regulation applicable thereto; and, it is expressly understood and agreed by the parties hereto, that the Seller shall not be held liable or responsible for the collection, deduction and/or payment of any sums required to be paid as aforesaid, and the Purchaser will save and hold harmless the Seller from any and all liability whatsoever, for the collection, deduction and/or payment of any sums required to be paid under any such law, ordinance or regulation.

(c) The Purchaser has qualified or hereby agreed to immediately qualify and will require his Assignees and/or any and all Sub-contractors to qualify, and remain qualified for the term of this Agreement, as an employer or employers under any and all Social Security laws or similar statutes, if permitted so to do voluntarily or otherwise.

Plaintiffs' Exhibit No. 4—(Continued)

In Witness Whereof, the parties hereto have caused this Agreement to be executed as below subscribed.

CROWN ZELLERBACH  
CORPORATION,

By /s/ LOUIS BLOCK,  
Chairman of the Board.

Attest:

/s/ D. J. GALEN,  
Secretary.

Witnesses:

/s/ E. H. POST,  
/s/ A. HEROUX,

/s J. W. GALLAGHER.

Witnesses:

/s/ B. K. GALLAGHER,  
/s/ ALCON E. J. GALLAGER.

[Endorsed]: Filed U.S.C.C.A. Sept. 22, 1947.

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(Original contract, dated April 13, 1942, between Earl L. McNutt and J. Ira McNutt, doing business under the name of McNutt Brothers, and J. H. Gallagher, thereupon received in evidence and marked Plaintiffs' Exhibit No. 5.)

## PLAINTIFFS' EXHIBIT No. 5

## Agreement

(Between McNutt Bros. and J. H. Gallagher)

This Agreement entered into between Earl L. McNutt and J. Ira McNutt, partners doing business under the firm name and style of McNutt Bros., and hereinafter for brevity sometimes referred to as "McNutt Bros.," and J. H. Gallagher, for brevity hereinafter sometimes referred to as "Gallagher,"

Witnesseth:

Recitals:

A. Gallagher has a letter from Crown Zellerbach Corporation dated March 13, 1942 committing that corporation to enter into a lease for the term of three years, for the rentals and on the terms and conditions set forth in said letter, entitling Gallagher, his heirs or assigns, to remove sand and gravel from what is known as the Santiam Bar, which is located at a point near the confluence of the Santiam River with the Willamette River in Polk County, Oregon. It is contemplated that a formal lease will be executed by said Crown Zellerbach Corporation and said Gallagher. A copy of said lease, when made, shall be attached hereto and marked Exhibit A and made a part hereof.

B. A right of way has been granted by A. W. Crocker and his wife to Gallagher over what is known as the Crocker farm, and a copy of said grant of right of way is attached hereto, marked Exhibit B and made a part hereof.



C. L. M. Gossler and his wife have granted to Gallagher a right of way over the Gossler farm; and a copy of said grant of right of way is attached hereto, marked Exhibit C and made a part hereof.

D. The rights of way granted under and by force of Exhibits B and C afford ingress to and egress from said Santiam Bar.

E. D. C. Crawford and his wife has granted to Gallagher, his heirs or assigns, a lease entitling Gallagher to take gravel and sand from an area inside lands owned by said Crawfords, for the price and on the terms and conditions set forth in said lease, and a copy of said lease is attached hereto, marked Exhibit D and made a part hereof.

F. Gallagher has incurred certain expenses in procuring said leases and rights of way.

G. Although the parties contemplate that most of the sand and gravel to be taken from the Santiam Bar will be used in connection with the development of the Cantonment now in the course of construction and situate between Corvallis and Monmouth, Oregon, nevertheless, it is also contemplated that McNutt Bros. will sell sand and gravel to any other party or parties desiring to buy for prices satisfactory to McNutt Bros.

Now, Therefore, in consideration of the premises and the mutual promises herein contained, and the moneys to be paid and things to be done as herein specified, it is agreed between the parties hereto as follows:



## I.

## Covenants by Gallagher

Gallagher covenants and agrees as follows:

1. That he will coincidently with the execution of these presents execute and deliver to McNutt Bros. assignment of:

- (a) The Santiam Bar lease;
- (b) The Crocker right of way;
- (c) The Gossler right of way; and
- (d) The Crawford lease.

2. That he will give such of his time and attention to sales of sand and gravel to be taken from said Santiam Bar and to the collection of the proceeds of such sales as McNutt Bros. may from time to time request; and Gallagher shall be paid by McNutt Bros. for said services, on a sale basis, such amounts as the parties hereto may hereafter determine, together with his reasonable expenses incurred in the rendition of such services.

3. That he will endeavor to obtain leases on such other areas as are accessible to said Cantonment as McNutt Bros. may indicate, and if Gallagher does acquire such leases on such terms and for such prices as may be mutually satisfactory to him and McNutt Bros. he shall assign the same to McNutt Bros. on such terms as McNutt Bros. and Gallagher may hereafter agree.

## II.

### Covenants by McNutt Bros.

McNutt Bros. covenant and agree as follows:

1. That they will within a reasonable time furnish and commence to install on the Santiam Bar, and with reasonable diligence complete the work of installing such equipment as will produce a minimum of seventy-five (75) yards more or less of sand and gravel per hour from said Santiam Bar.

2. That they will manage and carry on the work and business of operating said plant so to be installed until said Santiam Bar is exhausted, but in no event beyond the term of three years prescribed in the Santiam lease.

3. Nothing herein contained shall be so construed as to obligate McNutt Bros. to crush any gravel or any rock. However, it is agreed that if any rock or gravel is crushed in the operation of the plant on said Santiam Bar the parties hereto shall share in the profits on the same basis as herein prescribed.

## III.

### Mutual Covenants and Agreements

It is agreed between Gallagher and McNutt Bros. as follows:

1. McNutt Bros. shall be paid each month as rental for the use of all equipment installed by them an amount equal to Ten percent (10%) of the origi-

nal cost of such equipment for the first shift of each calendar day and Five percent (5%) for each additional shift in such calendar day.

Gallagher shall be paid rentals on the same basis as the rentals paid to McNutt Bros. for all equipment furnished by Gallagher at the request of McNutt Bros. and used by McNutt Bros. in the operation of the Santiam Bar.

2. The cost of placing equipment in position shall be included as a part of the expense of operation.

3. McNutt Bros. shall be reimbursed for expenses hereafter incurred.

4. Gallagher shall out of the first net profits be reimbursed for all expenses incurred by him to date.

5. Gallagher may from time to time and as often as he desires so to do call upon the Bookkeeper for information as to the then condition of the books with reference to the Santiam Bar.

6. All equipment furnished by the McNutt Bros. shall at the end of the operation hereunder be returned to McNutt Bros. in as good working condition as the same were at the time of the installation, reasonable wear and tear and damage by the elements excepted.

7. It is expressly agreed that the matter of operating the Crawford bar, if the same is operated, is to be determined by the parties hereto at some future time.

8. After paying all the expenses of the operation of the Santiam Bar the net profits, if any, shall be divided as follows: On the first day of each calendar month beginning with August 1, 1942 and so long as the parties hereto operate hereunder, all surplus funds remaining after the payment of expenses shall be divided one-third to J. H. Gallagher, one-third to Earl L. McNutt and one-third to J. Ira McNutt; and upon completion of the operations hereunder, with reference to the Santiam Bar, the McNutt Bros. shall furnish to Gallagher a complete statement showing the operations hereunder.

9. These presents shall be binding upon and the benefits thereof shall inure to not only the respective parties hereto but also to the respective heirs, legal representatives and assigns of the parties hereto.

In Witness Whereof the parties hereto have subscribed these presents in triplicate this 13 day of April, 1942.

/s/ EARL L. McNUTT,

/s/ J. IRA McNUTT,

Partners doing business

under the name of

McNutt Bros.

/s/ J. H. GALLAGHER.

[Endorsed]: Filed U.S.C.C.A. Sept. 22, 1947.

Mr. Twining: If your Honor please, the Government, of course, takes quite a different view of this case than that stated by Mr. Dezendorf. I came into this case rather late, as your Honor knows. I think there was a motion before the Court for summary judgment on the pleadings. No doubt your Honor is familiar with it. I doubt whether it was ever argued; nothing done about that.

In stating the Government's view, it is the Government's theory in this case that the plaintiffs' action was *res adjudicata*; that the issues were submitted and that the prior judgment is a bar to this action; if there is any technical jurisdictional objection, then, clearly, the principle of estoppel applies. This road has been fully paid for, and that was clearly expressed in the stipulation made and in the terms of the verdict brought in by the jury and in the judgment that was entered.

The verdict of the jury, in considering the roadway, including the roadway before the Court here, the section going across the gravel bar or to the gravel bar, the Crown Zellerbach section of the road, is as follows:

"We, the jury, duly empaneled and sworn to try the above entitled cause, do hereby find that the full market value of defendants J. H. Gallagher, Belle K. Gallagher, his wife, Earl L. McNutt and J. Ira McNutt's interest in 1.8 miles of road leading to the Santiam Bar and including damage to their interest in said bar, which interest exists under a contract from



Crown Zellerbach arising from this proceeding, as of June 18, 1942, was and is the sum of One Thousand Dollars (\$1,000), said roadway crossing, among other lands, a tract formerly owned by L. M. Gossler and Alta L. Gossler, his wife.

“Dated this 24th day of November, 1944.”

It was the Government's position at the time this case came on and when it was considered by Judge Fee and this jury that it was all included. The real problem in this case—I don't think it is a big problem, not so big as it appears. At least, *that the* Government's position. Judge Fee, when he passed on the case, stated very plainly, “If you do not own the rest of the road, then, you have not lost anything. If you do own all the rest of the road, then what is your damage here to this one section?”

So, in order to compensate the defendant in that case, necessarily it had to be viewed in the terms of the value of the entire road, and that was done. The stipulation made in that case, which was read to your Honor, stipulated for just that. The jury considered the fair market value of the entire road, a mile and eight-tenths across all the property, even including the interest in the gravel bar. There was no possibility of giving the defendant in that case any sum of money for taking a chunk out of that road. Judge Fee tried to keep the record clear. The jury considered here only one thing, the fair market value of this road in its entirety.

He states here in his remarks made from the bench at the time the motion for new trial was taken

under advisement, "I think the Court will not pass on the question whether or not the Tucker Act cases were involved in this matter, and whether the verdict was on those cases or not. That would be a question in another lawsuit." That is all. [14] He does not know what is coming up. He states here later——

The Court: Can either of you tell me what he meant by using the plural, "Tucker Act Cases?"

Mr. Twining: What he meant by the plural?

The Court: Yes.

Mr. Twining: Yes, I think I can, in the light of what he says here. There were many things that crept into this case, and it was known to the jury and made known to the Court that there might be any number of claims arising. There was the question of sand and gravel piles having been taken; there was the question of the roadway used, and they just had no picture of anything but this condemnation proceeding.

The Court: Was this condemnation confined solely to the road?

Mr. Twining: No, your Honor. Their case generally was a severance from the entire Camp Adair condemnation, this particular matter before the jury which we are speaking of now, and was discussed in these remarks of Judge Fee, denying the motion for new trial. The verdict of the jury, which I read to your Honor, applies specifically to the question then presented to the jury of compensating for this Gossler tract which bisected the road—simply taking a chunk out of the road and forever rendering it useless to the defendant in that case.

The Court: Was the Gossler land taken in that case?

Mr. Twining: The Court says in his opinion in this case: "Actually, the Court assumed that the defendants would not be fairly compensated for their interest in this roadway across the Gossler land unless the entire strip, commencing at the gravel pit on the Crown Zellerbach lands and running to the county road were evaluated. Whether these interests were paid for in this case does not affect the validity of the judgment here. If so, defendants have received more than they were entitled to because such interests were fairly submitted for evaluation." That is the interest involved here, the interest in the mile and eight-tenths—

The Court: This was just a case about the road. It was just a road case, not a case for the value of the land?

Mr. Fuller: The Gossler land was involved in Civil No. 1729. The interest of Gallagher across the Gossler land was not tried in the Gossler case. Gossler accepted the amount on deposit, leaving the interest of Gallagher in the road to be determined.

The Court: He brought another case?

Mr. Fuller: No, that was all in the same case. It was just the one interest that was determined in the condemnation. There was no trial as to the value of the fee, other than just ex parte testimony.

Mr. Twining: I think, your Honor, to continue here along the line that Mr. Dezendorf mentioned,

as to what Judge Fee said in denying the motion for a new trial in this case: Mr. Dezendorf suggested, "Of course, your Honor, that is involved in the Tucker Act case starting tomorrow. Is that what you have reference to?"

"The Court: No, I am not talking about that. The Court expressly told this jury that there was no gravel sold that was involved in this case. I don't know what that means, or anything else. If there is any gravel involved, that belongs to some other case; does not belong to this. As I take it, that involved simply the trial as to the value of this easement over a particular piece of land. That is the only thing that is involved. It is true, the Court did not submit to the jury the value of the easement over other lands, because of the fact that if you did not have an easement over this land you were not entitled to be paid. In other words, could you use the rest of the land if you could not use this? That is the theory on which this case was submitted."

Judge Fee carefully instructed the jury to find the reasonable market value of this whole road. That is what the testimony is—the whole road. That is what they found in their verdict, and, for that reason, we insist that there is just no basis for this suit. [17]

I am sorry, your Honor. I have not made a study of the law.

If the principle of *res adjudicata* does not apply, then, we come to the secondary thing, and that is, having filed this complaint, what is it you are ask-



ing for? You are asking for something for which, as a matter of record in the prior case, you have already been compensated. There is no way out of it. It so appears in the stipulation, in the judgment and in the Court's remarks as to what the parties were trying to achieve.

In so far as the factual aspect of this case is concerned, the Government's position is this—and I think a reading of the Crown Zellerbach contract will bear it out very plainly: The Crown Zellerbach people had a bar here, a valuable gravel bar, which they wished protected, and they had other interests there, and they wished to assist the Army in the use of that pit. When they made the contract with Gallagher, they did not know who would buy this gravel, so they wanted to protect themselves—so, in order to protect themselves, they very carefully put a provision in the contract that anybody else buying gravel from them shall have the right to use that road and they said to the Army, "You are entitled to be protected in accordance with this contract." What is the protection? That they can make a profit on the road? No. They are limited and they could [18] never charge a cent more than the proportionate cost of the road; after they got to the point where the road was paid for, they could not charge one single cent.

What did the road cost? The position of the Government is this, that before this Army situation arose they had use of the road themselves, and are entitled to bear some part of the cost of the mile and eight-tenths of road. Strong & McDonald paid



\$3,000 for the number of yards of gravel hauled that they hauled over this mile and eight-tenths, or this fraction of the road, which is somewhere around 25 per cent—maybe a little more—25 or 30 per cent of the entire road, and plaintiffs have already been paid \$1,000, another thousand dollars. Figuring it on a cubic-yard basis, it is practically 35 or 40 cents a yard for the gravel going over that chunk of road. That is what it amounts to on a mileage basis—five times what they paid for the gravel to Crown Zellerbach.

The Government's position is that they have been fully compensated, even if the legal aspects of the case do not preclude it.

Mr. Dezendorf: Shall we proceed with our testimony?

The Court: Yes. [19]

### STANLEY EDWARD QUIGLEY

was thereupon produced as a witness on behalf of the plaintiffs and, being first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Dezendorf:

Q. Your name is Stanley Edward Quigley?

A. Yes.

Q. By whom are you employed?

A. McNutt Brothers.

Q. Were you working for McNutt Brothers at the time this Santiam Bar road, in the vicinity of Santiam Bar, was built?      A. I was.

(Testimony of Stanley Edward Quigley.)

Q. What was your connection with the building of that road into the Santiam Bar?

A. I supervised it for McNutt Brothers.

Q. You were in complete charge, as far as McNutt Brothers were concerned, is that right, of that road?

A. That is right.

Q. Are you familiar with the cost of constructing the road, in so far as McNutt Brothers are concerned?

A. That is right, I am.

Q. What was the cost to McNutt Brothers of the work that they did on the road?

Mr. Twining: I object to that, if your Honor please. I think this question is immaterial. There is no question [20] here about the value of this road. It is not within the realm of the complaint and the pre-trial order. The whole thing is immaterial.

The Court: How are you going to approach it? I suppose it could be done on a footage basis.

Mr. Dezendorf: My theory is to show, first, the cost of the road, because I do not think it is practical to break down the cost of any particular part. My theory is that the cost of the whole road is the measuring stick which was laid down by the Crown Zellerbach Corporation and that that must be the measuring stick in this case. I understand the Government has a different theory.

The Court: Admitted, subject to objection.

Q. (By Mr. Dezendorf): What was the expense to McNutt Brothers for the work that they did on the road?

A. \$7,500.

(Testimony of Stanley Edward Quigley.)

Mr. Dezendorf: I think Mr. Gallagher is more familiar, your Honor, than this man, with distances.

A. That is right.

Mr. Dezendorf: You may cross-examine.

### Cross-Examination

By Mr. Twining:

Q. When were you there, actually, physically present on the road?

A. Every day during its construction. [21]

Q. What period of time was that?

A. Right after they entered into this agreement with Gallagher to build this road, which was along about the 14th, or somewhere after the 10th of April in 1942, until the road was completed.

Q. You say you were supervisor?

A. That is right.

Q. You were on the job there?

A. That is right.

Q. Over there every day? A. Yes.

Q. What hours did you work?

A. The men worked from 8 to 5.

Q. You were there all the time?

A. I wasn't there every minute of the day, no.

Q. Did you keep any books? A. I did not.

Q. Pay the bills? A. Yes.

Q. That is the way you got your figure of \$7,500?

A. That is right, and we kept our foreman there on the job and advised him to keep a daily record of every hour that the equipment and men worked. That is the practice that has been followed for years and still is.

(Testimony of Stanley Edward Quigley.)

Q. When you came in there, was there any road there? [22]

A. Mr. Gallagher had built a pioneer road, as we called it. That road was put into the bar, just between trees and so forth, so he could get the equipment into the bar.

Q. All the time you were there on this job, that was prior to the time Strong & McDonald came in?

A. I was there prior to the time they came in and was still around there when Strong & McDonald used the road.

Q. This \$7,500 construction cost you spoke of, was that incurred before Strong & McDonald came there?

A. That is right. That was in building the road and getting it ready to haul out over it.

Q. That is Gallagher's mile and eight-tenths road?

A. That is right, from the county road to the bar.

Q. Is the character of the road the same from the county road clear out to the gravel pit, or does it change in character?

A. Oh, it changes in character in different places. It would balance out, I think, about the same, but you know, you get some places where the timber is real thick and then there would be a gully and steep conditions——

Q. On the Crown Zellerbach tract, where the timbered area starts, isn't that most a gravel setup there?

(Testimony of Stanley Edward Quigley.)

A. No, that is not right. It varies from—just as you went over the property line, there was a large gully and there was soft marshland in there, and then you ended up [23] on the gravel bar.

Q. Do you know what the proportionate cost of this thing would be attributable to the Crown Zellerbach part of the road? Did you ever make any breakdown of that?

A. I did not, but I would presume that it was about evenly divided, maybe not exactly but pretty evenly divided in the three properties. That would be about right.

Mr. Twining: That is all.

(Witness excused.)

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### J. H. GALLAGHER

one of the plaintiffs herein, produced as a witness on behalf of the plaintiffs, being first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Dezendorf:

Q. You are one of the plaintiffs in this case?

A. Yes.

Q. What, if anything, did you have to do with building a road in from the county road to the Santiam Bar?

A. I built the pioneer road in there.



(Testimony of J. H. Gallagher.)

Q. Was that done by you and built under your direction?      A. Yes.

Q. What was your cost in building this so-called pioneer [24] road into the Santiam Bar?

A. About \$1,500.

Q. Speak up loudly so that we can all hear you. You say about \$1,500?

A. About \$1,500, yes, sir.

Q. What was the cost of acquiring the easements that were acquired on which to build the road?

A. To Crocker and Gossler, \$1,190 I believe was the figure.

Q. What is your business, Mr. Gallagher?

A. Well, I am a consulting engineer. We have a business there, the sand and gravel business; build roads and stuff of that kind.

Q. You have had experience in building roads prior to this time?      A. Yes.

Q. What, in your opinion, would be the reasonable and fair market value for the use of that road into the Santiam Bar in hauling gravel out over it?

A. Ten cents a yard.

Mr. Dezendorf: I think you may cross-examine.

### Cross-Examination

By Mr. Twining:

Q. Mr. Gallagher, could anybody pay ten cents a yard and compete with another company?

A. We were paid ten cents a yard for use of the road. That [25] was negotiated with Mr. Strong and he said he wanted to take 30,000 yards out of

(Testimony of J. H. Gallagher.)

there and agreed to \$3,000 on that basis. That is where I got that figure.

Q. He got 68,000 yards there?

A. I don't know, but he said he only wanted about 30,000 yards.

Q. Is it not a fact that you figure the hauling cost of hauling gravel, that it costs about ten cents a mile around that area?

A. That was the prevailing price at that time, yes, ten cents a mile.

Q. That includes wages, truck use and everything else; in other words, if you were going to haul gravel and deliver it five miles from the pit, you would have to put a 50-cent charge on it to offset your cost of hauling?

A. That would be just for trucking, yes.

Q. Here you think it is proper to charge ten cents a mile for a mile and eight-tenths of road?

A. Well, Mr. Strong did not object to it.

Q. But actually what Mr. Strong paid was less than five cents a yard for the full mile and eight-tenths of road, isn't that right?

A. Shall we say Mr. Strong misrepresented his case to me?

Q. It was a case of misrepresentation?

A. Yes, sir. [26]

Q. Mr. Gallagher, you are familiar with the contract you made with the Crown Zellerbach people?

A. Yes, sir.

Q. Was it your interpretation of the contract that you would charge the fair, reasonable market value of that road?

A. Yes, sir.

(Testimony of J. H. Gallagher.)

Q. You remember those words, describing the cost of the road——

A. Repeat that question.

Q. Your contract states that you are to be protected in your roadway and that you can charge for that roadway a fair, reasonable rate per cubic yard?

A. Yes.

Q. Based upon the cost of that road?

A. Yes

Q. Is it your position that gives you the right to make a fair, reasonable charge on any amount of gravel or just up to the amount of the cost of the road?

Mr. Dezendorf: The contract also provides that maintenance may be taken into consideration, after the original cost. I don't think the question is just proper.

Q. (By Mr. Twining): Do you think your contract limits you to a recovery on your cost of building the road and maintenance, or do you think you can make a money-making proposition out of it and get all the market would bear, regardless of the cost of the road?

A. Well, we thought that the price asked was a reasonable price, and we wanted to get our money out. We did not know that there was any more to be hauled. We thought ten cents, in other words, was a reasonable price, and would still leave us holding the sack.

Q. You think, then, the Government hauling 68,000 yards over the Crown Zellerbach portion of this

(Testimony of J. H. Gallagher.)

road a matter of maybe 3,000 feet or so, roughly, and getting ten cents a yard for that is reasonable?

A. Yes, I think so, sir, yes.

Q. In the light of your cost? A. Yes.

Q. Then, you feel about three or four times that rate would be proper to haul it to the county road, a mile and eight-tenths, over three times as far?

A. As far as is concerned, they were hauling over the whole road.

Q. You had been paid for the rest of the road, isn't that right?

A. We had not been paid, no, we had not been paid for it yet.

Mr. Twining: I think that is all. [28]

### Redirect Examination

By Mr. Dezendorf:

Q. There is one question I forget to ask. Have you measured the actual distance from the Gossler line to the Santiam Bar, which is the Crown Zellerbach property? A. Yes.

Q. What is the distance from the Crown Zellerbach land on that road?

A. May I refer to my field notes?

Q. Yes.

A. It is, I think—it is 3,250 feet. I measured it with a tape the other day. It measured 3,155 feet by tape.

Q. 3,155? A. Yes.

Q. That is approximately six-tenths of a mile, is it not? A. Yes.

(Testimony of J. H. Gallagher.)

Q. The whole road was a mile and eight-tenths?

A. On my speedometer, yes, 1.8 miles.

Mr. Dezendorf: That is all.

Recross-Examination

By Mr. Twining:

Q. Did you haul some gravel out over this road?

A. Yes.

Q. Strong & McDonald hauled some out?

A. That is right. [29]

Q. Do you know of any other parties that did?

A. Do I know——

Q. Do you know of any other parties that did,  
in addition to the Government?

A. No, I don't.

Mr. Twining: I think that is all.

(Witness excused.)

Mr. Dezendorf: That is the plaintiff's case.

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CARL B. FORSMAN

was thereupon produced as a witness on behalf of the defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Twining:

Q. Mr. Forsman, what was your capacity at Camp Adair during the period mentioned?

A. I was Assistant Executive Officer of the Post.



(Testimony of Carl B. Forsman.)

Q. Did you, as part of your official duties, have certain negotiations about this road we have been speaking of here?

A. Not the road; not directly the road; the gravel bar.

Q. You had occasion to go over this road?

A. Yes. [30]

Q. When did you first go over it?

A. The latter part of October, 1942.

Q. Can you state what condition it was in then?

Mr. Dezendorf: If the Court please, I do not think that is material what condition it was in. It seems to me the only question here is the cost and the reasonable value of its use.

Mr. Twining: As I gather the issues in this case, the reasonable cost and value of its use ran over a three-and-a-half-year period here, the time when Strong & McDonald used it and the time when the Army used it. I do not see why the question of maintenance and the condition of the road is not important.

The Court: Answer the question.

A. Read the question.

Q. (By Mr. Twining): Can you state what condition the road was in when you first went there, in October?

A. It was in poor condition and the Army had to rebuild the road to make it usable for hauling gravel, despite the fact that some Army vehicles had hauled gravel prior to our rebuilding it, prior to our rebuilding the road.

(Testimony of Carl B. Forsman.)

Q. Were you there in the spring of 1943?

A. Yes.

Q. Did you see the road then?

A. Before and after we rebuilt it, yes. [31]

Q. Can you tell the Court what happened there that winter with regard to that road?

A. I do not quite understand your question.

Q. When you went in there first, in October, you say you had to rebuild the road, that the road was in rather bad shape?

A. Yes, we rebuilt it after the flood, just before we could begin hauling gravel for the Camp.

Q. Were you familiar with the road during the course of time the Army took out these 68,000 yards of gravel?

A. The Army maintained the road during that time.

Q. You know that of your own knowledge?

A. Yes. I don't know what the cost was, but it was maintained by the Post Engineer.

Mr. Twining: That is all.

#### Cross-Examination

By Mr. Dezendorf:

Q. You are the Carl B. Forsman who executed this contract with the Crown Zellenbach Corporation on behalf of the Army, are you not?

A. Yes.

Q. That is your signature on there (referring to Plaintiff's Exhibit No. 1)?

A. Yes, sir.

(Testimony of Carl B. Forsman.)

Q. At the time of your negotiations with the Crown Zellerbach [32] Corporation and at the time this contract was executed, you knew that Gallagher had an agreement with Crown Zellerbach Corporation covering this road?

A. At that time, I didn't know that. I knew he had an agreement to take gravel out the road—I do not believe my first trip to the Crown Zellerbach Corporation was about the road. It was merely to get gravel at a certain price in our emergency.

Q. However, before you signed that contract, you did know about the contract?

A. That is right.

Q. With Gallagher?

A. That is right, yes, sir.

Mr. Dezendorf: That is all.

(Witness excused.)

Mr. Twining: If your Honor please, we had anticipated the testimony might take a little longer, and wanted to get Mr. Shull over here from the Crown Zellerbach Corporation. He is not available right now. He is in Astoria. I understood he was coming in this morning. I think we would like to take his testimony. He is the only witness that knows the facts and circumstances of the road conditions there and the value of the road and the amount of the reasonable royalty to be paid on the road. I would like to have the [33] privilege of placing him on the stand later, if necessary.

The Court: Do you want to offer him as a witness this afternoon?

Mr. Twining: Yes.

The Court: All right. I will be available, if that is what you want to do. With that in mind, do you want to consider the case submitted, then?

Mr. Dezendorf: I would like to make a short argument at the close of the case, your Honor. There are some points that I would like to cover.

The Court: Let us use the half hour that we have available now.

Mr. Dezendorf: All right. It is necessary, your Honor, in order to understand the condemnation action, to have in mind the relative positions of the Government on the one hand and Judge Harris and myself, as attorneys for Gallagher and the McNutts, on the other. It all appears, however, in the transcript of testimony which is available as one of the exhibits in the other case.

There were three ownerships involved over which that road went. Next to the county road was Crocker, beyond him was Gossler and then the Crown Zellerbach land. Through some oversight, the Government forgot to make Gallagher and McNutt Brothers parties in the Crocker condemnation action, although the assignment was of record. They did make Gallagher [34] and the McNutt brothers parties to the Gossler case, which affected the middle portion of the road. No effort was ever made to condemn the Crown Zellerbach property.

As the record in the Gossler case will show, prior to trial there were various motions and various mat-



ters that came up before Judge Fee and up until the time of trial—in fact, the day before the case came to trial—the Government was taking the position that all it had to do in the Gossler case was to pay the replacement cost of that one-third section of the road, and that is all.

Now, the law is clear that where the Government takes some property and does not compensate for the interest taken the persons who are left out of that case have a claim under the Tucker Act for the reasonable, fair market value of their interest taken. So, as we approach the trial of this case, Gallagher and the McNutt brothers had a pure out-and-out Tucker Act claim against the Government for whatever the value of their interest was in the Crocker land, if they had an assignment of record, and they were not joined in the condemnation proceedings; Gallagher and the McNutt brothers had a clear out-and-out Tucker Act case for the value of the stock-pile of sand and gravel that was taken off the bar by the Army.

When we came to trial, however, the Government, for the first time, conceded that the measure of damages [35] for the taking of the Gossler section of the road was the reasonable, the fair market value—the reasonable and fair market value of the whole road, and we were willing to try the case on that basis, which meant that we were willing to waive the Tucker Act claim for the Crocker land because the Government obviously had title to that.

We all would have been very happy if Judge Fee had submitted the value of the whole road to the



jury but, if you will look at his instructions, he did not submit it, and that was the reason that we were anxious to move for a new trial and get another chance at getting the whole value out of the road.

Now, counsel has suggested that he thinks the Gallagher and McNutt claim is too high, but let us look at the figures. This road cost \$1,190 for the easement, \$1,500 for the pioneer road; \$7,500 for the actual road which McNutt Brothers built of the whole road, which was \$10,190.

The admitted facts show that Gallagher and McNutt Brothers hauled out over the road some 3,000 yards; Strong & McDonald, 68,000 yards, and the Army about 66,000 yards.

Gallagher and McNutt Brothers have received, on their \$10,000 expenditure, \$1,000 from the Government, \$3,000 from Strong & McDonald, bringing their own cost in that road to \$6,190. As Mr. Gallagher testified, the agreement with Strong & McDonald was for ten cents a yard for 30,000 yards they anticipated taking out. It is true they took out more but whether they knew they were going to take out more no one will ever know.

I think a fair figure to charge the Government, in order to recover for these people the unrecovered cost of the road, is approximately ten cents a mile a yard which will recover for them six thousand odd dollars, the six thousand odd dollars that they have in this and which has never been recovered.

Mr. Twining, in referring to Judge Fee's opinion stopped just before the last sentence. The last sentence is the part which suggests the filing of another

action. After what Mr. Twining read, Judge Fee continued: "If in some other case, the defendants contend that for jurisdictional reasons the interests were not legally so submitted, the question of the effect of the stipulation and this judgment can be thus considered and the rules of *res judicata* applied."

As I see it, the issues to be determined are relatively simple. There are only three of them and they are phrased in the pre-trial order. The first issue is whether the Government acquired ownership of that portion of plaintiffs' road which was constructed upon land owned by Crown Zellerbach Corporation in the condemnation action relating to the Gossler land. The answer to that will have [37] to be "No" for this reason: Condemnation actions were filed covering the Crocker and the Gossler sections. The Crown Zellerbach Corporation land was never condemned. The only thing which was litigated in the Gossler case was the value, as Judge Fee's instructions show, of the McNutt Brothers' and Gallagher's interest, in so far as the Crocker and Gossler lands are concerned, and nothing else.

The Government apparently takes the position that it acquired some kind of an interest in the road on the Crown Zellerbach Corporation property by reason of the stipulation between the Government counsel and myself, which was in November, 1944. If we assume that the Government did, at some time, acquire some interest in that road on the Crown Zellerbach Corporation land, it would be by virtue

of the stipulation in November, 1944, which was after the Government had made all this use of the road. The Government's use of the road started in October, 1942, and ended in August, 1944. This stipulation was made in November, 1944, so, even if we assume the Government did acquire some interest, it got it after it had used this road, with full knowledge of Gallagher's interest in it under the terms of his contract with the Crown Zellerbach Corporation.

That leaves only the question as to the cost of the road and the reasonable value of the use which the Government made of the road. The Army was very much put [38] on notice of Gallagher's interest in this road.

I think, under the facts disclosed in this case, Gallagher and McNutt Brothers are entitled to \$6,000 in this case.

Mr. Twining: It seems to me, if your Honor please, it is all a matter of simple arithmetic. There isn't any issue in this case, not a single issue that obligates us now to pay anything. Here we have a road, a mile and eight-tenths in length, with about six-tenths of a mile of it crossing the Crown Zellerbach tract. What Mr. Dezendorf is saying is that the Government ought to be stuck, no matter what, for the balance, no matter what it is, no matter what the contract provides. That is the silliest thing I ever heard in my life.

There are 3,000 feet of road there, across the Crown-Zellerbach land, and the issues in this case are confined to payment for the use of that 3,000

feet. Whatever else may be said about this prior case, the Gossler and Crocker property had been paid for. Judge Fee, in submitting that case to the jury, read the form of verdict to the jury. How can a Judge submit an issue more clearly than that? He even read the form of verdict and told the jury it must find the full market value of the entire road, including the value of the gravel bar, or including damage to their interest in said bar by reason of the contract with the Crown Zellerbach [39] Corporation. The entire road was considered. When that jury's verdict was returned, there was no possibility of crawling around that one. If there were, it is double-blocked by the agreement entered into and then it is trebly blocked again by the fact that there is no attack upon the Gossler and Crocker property at all.

The plaintiffs here want to be paid for this 3,000 feet of road at the rate of about 40 cents a mile, on top of everything else that they have been paid. That is what they are asking. \$7,500 for building that road? I haven't any figures here, and that figure will have to be accepted, as far as the proof goes, but I do not believe it. I have lived in this country too long, fishing these bars, to go along with that; I know that country too well. It is flat land. Plaintiffs say it cost \$7,500 to build a mile and eight-tenths of road to a gravel bar. Plaintiffs got \$3,000 from Strong & McDonald on this deal. They hauled 66,000 yards. I am not going to argue about it because it speaks for itself. There is no getting away from the fact that the Crown Zeller-



bach Corporation did not intend for these boys to go out and victimize anybody, even if they could, even if the traffic would bear it; they never intended that they should go out and slip it over on anybody at 10 or 15 or 20 cents. The Crown Zellerbach Corporation precluded that in the protection of their interests and they passed their rights on to the [40] Army, as is plain in this case. Now, the proposition here, under this theory of the case, is to get all they can, regardless of what the deal was, and there is only 3,000 feet of road involved. That has been paid for in many ways. As I said, it is just a matter of simple arithmetic to figure out what the amount of hauling cost would be.

Is it reasonable? 66,000 yards? \$7,500? That is more than ten cents for 3,000 feet of road, and there is a mile and eight-tenths of road here altogether. If you haul 66,000 yards over 3,000 feet at that rate, you pay for the whole shebang, despite the reservation made by Crown Zellerbach Corporation in their contract, despite the fact that the Gossler and Crocker interests had been paid for.

I do not think there is any need for me to go into what Judge Fee said. Your Honor knows, I think, very plainly what he said in that case. He is very plainly looking forward to the rule of *res judicata*—very plainly, it ought to be applied here. At least, your Honor, I can sincerely say to the Court that I can see no moral reason, no reason in justice, no reason at all why, when the entire matter was placed before the jury in that other case, there should be any recovery here by these plaintiffs.



The Court said to the jury in that case, "You are to find the fair, reasonable market value" and, when the stipulation, in plain words, says, "Yes, we will agree to [41] the jury's finding the fair, reasonable value of the entire road," that is all there should be to it. The proposition then was the road from the county road clear across to the Santiam Bar, clear across the Crown Zellerbach property, including rights to the gravel bar—the entire cost of the road. They agreed to that stipulation, and the jury so found and the money was accepted and everybody went on their way. Now, despite the fact that that 3,000 feet was included in the entire road, and that the entire road was considered by this jury, they come in here and want to be paid again in this case. They received \$3,000 from Strong & McDonald for the use of their road; they received \$1,000 in the Gossler case and, as your Honor knows, they went in there and stockpiled gravel, and some consideration should also be given to their own use of the road. Under the terms of the contract with the Crown Zellerbach Corporation, they could not make a profit on it, because it immediately went back to the Crown Zellerbach Corporation.

There are so many reasons here why I think this whole thing is an outrage. The actual facts, the simple arithmetic involved is something that would shock anyone. 66,000 yards hauled over 3,000 feet. Figure that out and see where we get. That would be all right if it were a black pirate toll gate. Possibly, you couldn't blame him, but we are talking

about something that is not even remotely [42] within the realm of reason here.

The Court: Recess until 2:00 o'clock.

(Court reconvened at 2:00 o'clock p.m.,  
Wednesday, March 19, 1947.)

Mr. Twining: I have one witness to call in this case, Mr. Shull.

The Court: Proceed.

J. T. SHULL

was thereupon produced as a witness on behalf of the defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Twining:

Q. Your name is J. T. Shull? A. Yes.

Q. You are an engineer for the Crown Zellerbach Corporation? A. Yes.

Q. Mr. Shull, are you familiar with the Gallagher road leading in from the county highway to the Santiam Bar, the gravel pit located at the Santiam Bar? A. Yes, I am.

Q. You are familiar with that section of it starting from the Crown Zellerbach line up to the gravel pit? A. Yes. [43]

Q. The last 3,000 feet, approximately six-tenths of a mile to the river? A. Yes.

Q. Can you describe briefly what kind of a road that was in 1941, the spring of 1941?

(Testimony of J. T. Shull.)

A. Well, it was—of course, it was a road built primarily for hauling gravel out and it was cut through the timber on the Crown Zellerbach property; approximately twelve feet wide or thereabouts and varying in some places a little wider and in some places a little narrower, but I would imagine it would average around twelve feet in width. There were some trees that had to be cut down and stumps shot out in order to grade the road through but, in general, why, it was just an ordinary rough graded road, but of course with a gravel surface.

Q. Can you say, in your judgment as an engineer, what it would cost to construct that six-tenths of a mile of road as it was then?

A. I would estimate around \$2200 or a little over \$2200.

Q. You have had some experience with gravel hauling operations in connection with the operations of the Crown Zellerbach Corporation?

A. Yes, I have.

Q. Assume in this case that the Army hauled out 66,643 cubic yards of gravel over that six-tenths of a mile of road, that six-tenths mile section of road there, between October, 1941, [44] and the spring of 1944, say, April, 1944, could you say what would be, in your estimation, a reasonable charge per yard for the use of this six-tenths miles for that operation?

A. Well, I would say it would be nominal, a nominal charge, because it would have to be figured

(Testimony of J. T. Shull.)

on the investment and, as I understand it, the investment was pretty much paid back. I would say two cents a yard would be a fair royalty, on just that short section of six-tenths of a mile.

Mr. Twining: I think that is all.

Mr. Dezendorf: That is all.

(Witness excused.)

Mr. Twining: Nothing further.

(Testimony closed.)

The Court: Is there further argument?

Mr. Twining: None, your Honor, except this: I would seriously like to bring to your Honor's attention the fact that this case came to me late, as your Honor knows. However, I think from the prayer of this complaint, considering the amount of value sought to be recovered here, considered in the light of what could be possibly be paid for this stretch of road, and what was paid, and what the contract with Crown Zellerbach says about it, and considering also [45] the whole history of this case, as it appears from the pre-trial order and the facts stipulated to and the exhibits that have been introduced in this case, I think it becomes very apparent that it is tremendously exaggerated, even though there is an action here.

The Court: Submitted. [46]



Monday, May 5, 1947, A.M.

Proceedings in re: Motion for New Trial, etc.

Mr. Twining: This matter, your Honor, comes up on the motion for new trial. I do not want to spend any time on some aspects of this case. I felt from the nature of the stipulation and the verdict in the former case that the matter was determined, at least some of it, upon submission to the forum of the entire issue, being the situation of the length of the road, the time element, the interest in connection with the gravel bar, and the interest having been paid on the amount determined since June 18, 1942. However, those matters were before your Honor. What I really wanted to go into here, I think, are just a few of the reasons in support of the motion which has been made here. First, I wish to say to the Court that I do not think I presented this case to well. It came to me rather late; I had not talked to any of the witnesses; there were things about it I did not have in mind.

**But from the standpoint of the verdict itself,** your Honor, I think it is not supported in the evidence or could be supported in law to the extent of \$5,800 for these reasons—and I will try to be short here.

First, in the pre-trial order, your Honor, there are four issues formulated and they are confined entirely to the Crown Zellerbach portion of this road. Your Honor will recall, aside from any other legal effect upon this section of road, that this road represents exactly one-third of the whole or six-



tenths miles—exactly one-third. On June 18th, the other two-thirds were taken and they were compensated for in the condemnation action.

We regard this matter now the same as when this gravel hauling was done by the Government. The other two-thirds of the road are completely out of the picture; could not be considered in any way, shape or form in this case.

Going back to the Tucker Act case, the whole matter was tried, and I think necessarily so, on the basis of the reasonable market value. Aside from the contract between plaintiffs here and Crown Zellerbach Corporation, no other element could be considered as a major factor at least. The road cost cannot be at all determinative and, in fact, under the facts of this case, would not be proper.

It is true that this contract mentioned in every case—let me put it this way: That the assignees of Crown Zellerbach can use this road and plaintiffs in this case will charge a reasonable amount for that use but in no case to exceed their recovery on the road. In other words, it does not extend their recovery; it limits their recovery. The Crown Zellerbach Corporation were trying to accommodate those [48] who were hauling gravel. They said by their contract that “When this road has been paid for, you cannot charge anything.” They would not have been able to charge a nickel after this road had been paid for. Crown Zellerbach were interested in selling lots of gravel cheap. That was the picture then. There were two limitations then—first, the reasonable value per cubic yard and, in no case, more than the road cost.

What happened in this case? Your Honor will recall at the time the testimony was given in regard to the cost of the road, \$10,190, I objected to that and Mr. Dezendorf said it would be tied up, and the testimony was admitted subject to that situation. There is no evidence in this case, not a shred, of any reasonable value as to the road, and that matter never was tied in. The closest it came to being tied in was when I, on cross-examination, asked the plaintiff if he felt that the road on the Crown Zellerbach property was the cheapest to construct. He hesitated and he said no, that it was all about the same. Plaintiffs testified that they paid \$1,190 for two easements on the other property, but that had nothing to do with the road cost and it was completely put out of the picture by the other case. That left the road construction cost \$9,000, approximately, based on the testimony and, the Crown Zellerbach portion of it, being one-third, would cost \$3,000. Under the contract, there [49] was to be credited to that what credit he had already received, which would take into consideration the amount received from Strong & McDonald, \$3,000, and the \$1,000 that they received in the other case, and their own use, a recovery in the neighborhood of \$1,500.

I asked the plaintiff himself what the reasonable charge would be on that particular road, including all costs, wages, trucks, gasoline, tires, overhead and everything, and they said that people in that neighborhood charged ten cents a mile. That would bring the use of that road cost, the reasonable road

cost, down to about two or three cents per mile. Mr. Shull, the engineer from the Crown Zellerbach Corporation, said the nominal charge for use of six-tenths of a mile of road would be something in the neighborhood of two cents.

No matter how it is figured, \$1,400 or \$1,500 is reasonable.

I feel that the Government is being penalized, in effect, in this case. I thought perhaps the Court had not considered the contracts themselves and had considered that plaintiffs were entitled, no matter what part of the road they used, or what intervened, to recover the full balance of their unrecovered road costs. I do not think that is the case. I do not think that is the proper approach to it.

Here, for instance, the plaintiffs built this road prior to June, 1942. The complaint and pre-trial order set up the fact that within six months following Strong & McDonald moved 68,203 cubic yards of sand and gravel and then, for the following two years, our use was made of this road by the Army in removing 66,000 cubic yards of gravel, and all that was two or two and a half years after plaintiffs expended their costs. The road then might not even have been worth a cent. As a matter of fact, it was testified in the case that it was impassable in the spring of the year. There was the intervening use by Strong & McDonald; then that winter came floods and rain. There is no showing whatever even that there was a road there, as far as that is concerned, a passable road. The costs were expended

in building the road prior to any use in this case by the Government. I think there can be no doubt that we should not be charged for a road that we had the power to bar plaintiffs from themselves. I do not think, as I understand the case, after June 18th the plaintiffs could have gone upon that road.

I believe the true approach to this case as to what we must pay should be viewed as if we used the Crown Zellerbach and didn't use the other two-thirds at all. I believe the standard in this case, considered in the light of the contract with Crown Zellerbach and under the Tucker Act case, would be this: What was the position when we started out to use this road? What would be reasonable to ask us to pay? [51] If we had hauled only a hundred yards, if this standard is correct, we still could pay \$5,800 for hauling a hundred yards of gravel.

I think, to understand what the Government must pay in this case, we should consider what would be reasonable for the use of this section of road. Under this basis, we would be paying here about somewhere close to 30 cents for the use of that entire road—well, 16 or 17 cents a mile for road use and haven't even begun to pay the wages of the truck driver and the gasoline and anything else. It would be a very exorbitant rate. It would be impossible, of course, on that basis.

You say here, "He is in a position to stop you from using it and make you pay for it," but I do not think we can use that standard, your Honor. Plaintiffs made their deal there. Plaintiffs received



certain income and recompense for that road. The jury compensated them as of June 18th. The Government now owns all that road, that other two-thirds.

Therefore, we used one-third of the road that, according to plaintiffs' theory of the case, was not disposed of in the condemnation case and, therefore, for that one-third of the road, which cost under \$3,000, we are paying \$5,800—we are paying \$5,800 for hauling 66,000 yards of gravel out at a time that has never been tied in with the [52] cost of this road.

I look at this way, as if, your Honor, we used a hotel composed of three wings. It cost \$100,000 to build it; it has been used for twenty years. We come in and use one wing of that hotel and then, if we take the other two and compensate the owner for them, we pay for that one wing the whole balance, over and above the income received. It does not seem to me we should apply any such standard. We have to pay for what we use, the reasonable value.

The Crown Zellerbach contract would only be a minor factor in showing what the actual road was worth. The question is, what it would be worth to use. I believe the same standard should be adopted as in condemnation cases, not what a man can charge for it or what he might get under unusual circumstances, but applying the rule as to fair market value. That is the standard used in con-



demnation cases and I think such a standard as that should be used in this case.

The sole intendment of the Crown Zellerbach contract was this: "We are going to give you this gravel; we are going to sell it to you cheap, but we are not going to be barred out of our own gravel bar; lots of people will be wanting to buy gravel. Therefore, we are going to sell it to anybody that wants it, but you have got to let them use your road. It is only equitable that you charge them a reasonable price per cubic yard for the use of the road, but nothing in [53] excess of your cost; you cannot make a profit on your road so, after you reach the time when you have been compensated for your road, you cannot charge a nickel, you cannot charge a nickel to haul gravel over this road, even if it is worth 3 cents or 4 cents or whatever price it is worth to haul it." Then they say, "But until that time arrives, you may charge a reasonable price per cubic yard and definitely, when you have finally been paid for your road, you are through."

I do not know too much about the background, but it appears that it developed that Gallagher and McNutt Brothers' plans changed and that they did not get certain contracts. They had already received \$3,000 from Strong & McDonald. At the time the jury went down to look at this property, there was a different proposition, a different situation, as of June 18th, which is the standard set for the jury; but what was the situation in late December here?

Well, at that time, if we have never used the road but condemned these two pieces, in the light of events as they were then, it is reasonable to suppose Gallagher and McNutt Brothers would never have anything coming. For us to come in now and pay twice, at this late stage, for the use of this one-third of the road—to pay twice what Strong & McDonald paid for the whole road, in other words, for a mile and eight-tenths of road—is entirely inequitable. Strong & McDonald paid \$3,000 and they used a mile and eight-tenths of road. [54] Now, we come along to October, when we first came into this case, by the pleadings or any other way, as far as this action is concerned, and begin to haul gravel and it takes until October, 1944, to haul it out, and in that time use two-thirds of the road which has already been compensated for. Now, plaintiffs come along and want us to pay \$5,800 for using just one-third of the road.

I have not seen a transcript, but I find no testimony at all, either as to time or place, even, of the reasonable value of that third of the road. That was never mentioned. The only amount mentioned in the whole case as to the reasonable value of the use of that road was the testimony of our engineer who said \$2,300, and he said that 2 cents a yard would be ample to pay for it. That is just about what Strong & McDonald paid, and they used three times as much road. Here in this instance we are asked to pay six times as much as Strong & McDonald, and it is just something that cannot be sup-

ported by the record. I do not think there can be any intendment in the contract with Crown Zellerbach to the effect that you can turn around and, as a matter of hindsight, charge somebody. The position of the plaintiffs here, to me, is not logical, your Honor, and I think we have submitted in this case the fair and reasonable standard that must be applied here. I feel there is real merit in that.

Mr. Dezendorf: I think the Court is fully familiar with [55] the record, at least as well as we are. I do not think I care to make any argument.

The Court: I will have to review this. Mr. Holcomb has taken down the Major's argument, so he can read it to me.

Mr. Dezendorf: The only thing I can say is that Gallagher testified at the outset as to the reasonable market value of the road, what the use of the road was.

Mr. Twining: His testimony ran as to the cost of the whole road, a mile and eight-tenths.

Mr. Dezendorf: That is right. [56]

[Title of District Court and Cause.]

### REPORTER'S CERTIFICATE

I, Ira J. Holcomb, Court Reporter of the above-entitled Court, do hereby certify that on the 19th day of March, A. D. 1947, and on the 5th day of May, A. D. 1947, I reported in shorthand certain proceednigs occurring in the above-entitled cause; that I thereafter caused my shorthand notes to be reduced to typewriting, and that the foregoing transcript, consisting of 56 pages, numbered 1 to 56, both inclusive, constitutes a full, true and accurate transcript of said shorthand notes so taken by me on said dates, as aforesaid, and of the whole thereof.

Dated this 21st day of May, A. D. 1947.

/s/ IRA J. HOLCOMB,  
Court Reporter.

[Endorsed] No. 11733. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. J. H. Gallagher, J. Ira McNutt and Earl L. McNutt, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed September 22, 1947.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

United States Circuit Court of Appeals  
for the Ninth Circuit

No. 11733

UNITED STATES OF AMERICA,

Appellant,

vs.

J. H. GALLAGHER, J. IRA McNUTT and  
EARL L. McNUTT,

Appellee.

STATEMENT OF POINTS AND  
DESIGNATION OF RECORD ON APPEAL

Appellant adopts and will urge as its points on appeal the statement of points appearing in the transcript of record on file herein; and

Appellant designates, for printing, the entire certified transcript of record on file herein.

Dated at Portland, Oregon, this 2nd day of October, 1947.

/s/ HENRY L. HESS,

United States Attorney

for the District of Oregon.



CERTIFICATE OF SERVICE BY MAIL

United States of America,  
District of Oregon—ss.

I, Floyd D. Hamilton, Assistant United States Attorney for the District of Oregon, hereby certify that I have made service upon the appellees of the foregoing Statement of Points and Designation of Record on Appeal, by depositing in the United States Post Office at Portland, Oregon, on the 2nd day of October, 1947, a duly certified copy thereof, enclosed in an envelope, with postage thereon prepaid, addressed to James C. Dezendorf, 800 Pacific Building, Portland 4, Oregon, Attorney for appellees.

/s/ FLOYD D. HAMILTON,  
Assistant United States  
Attorney.

Subscribed and sworn to before me this 2nd day of October, 1947.

[Seal]      /s/ V. E. HARR,  
Notary Public for Oregon.

My commission expires 1/17/51.



No. 11733

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In the United States Circuit Court of Appeals  
for the Ninth Circuit

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UNITED STATES OF AMERICA, APPELLANT

v.

J. H. GALLAGHER, J. IRA McNUTT, AND EARL L.  
McNUTT, APPELLEES

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UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE DISTRICT OF OREGON

---

**BRIEF FOR THE UNITED STATES**

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A. DEVITT VANECH,  
*Assistant Attorney General,*

HENRY L. HESS,

*United States Attorney, Portland, Oregon.*

ROGER P. MARQUIS,  
ELIZABETH DUDLEY,

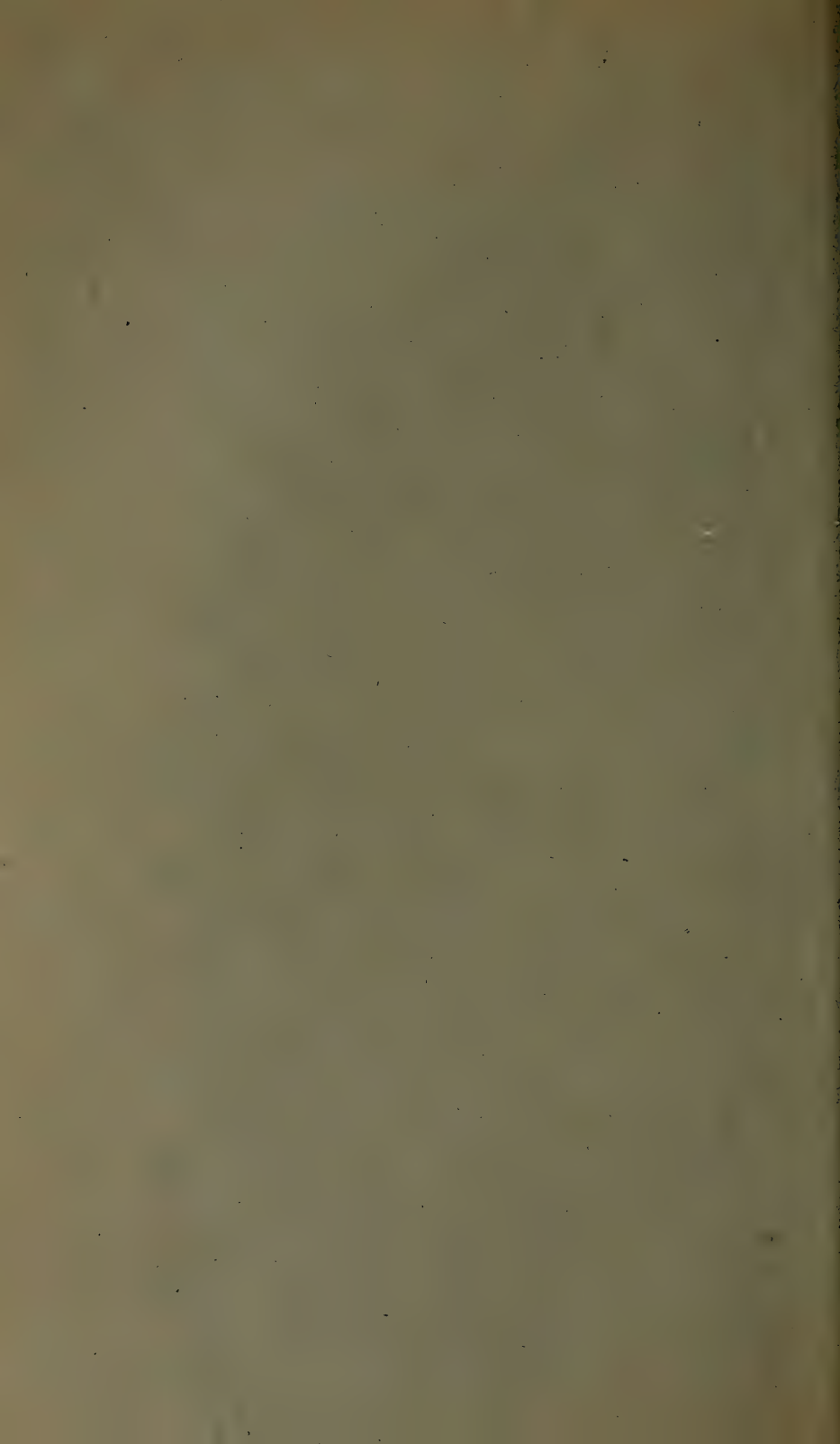
*Attorneys, Department of Justice, Washington, D. C.*

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PALL P. O'BRIEN, JR.  
CLERK



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# **In the United States Circuit Court of Appeals for the Ninth Circuit**

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No. 11733

UNITED STATES OF AMERICA, APPELLANT

*v.*

J. H. GALLAGHER, J. IRA McNUTT, AND EARL L.  
McNUTT, APPELLEES

---

*UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE DISTRICT OF OREGON*

---

## **BRIEF FOR THE UNITED STATES**

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### **OPINION BELOW**

The district court wrote a memorandum opinion (R. 41); and its findings of fact, conclusions of law and judgment are set out at R. 46-54.

### **JURISDICTION**

The judgment of the district court was entered on April 4, 1947 (R. 54). The United States filed a motion for new trial and for amendment of findings of fact, conclusions of law and judgment on April 11, 1947 (R. 55-60), which was denied by the court on May 22, 1947 (R. 61). The United States filed notice of appeal on August 19, 1947 (R. 62). The jurisdiction of the district court was invoked under the Act of

March 3, 1887, c. 359, secs. 1, 2, 24 Stat. 505, as amended; 28 U. S. C. sec. 41 (20), commonly known as the Tucker Act (R. 2). The jurisdiction of this Court is invoked under Section 128 of the Judicial Code, as amended, 28 U. S. C. sec. 225 (a).

#### QUESTIONS PRESENTED

1. Whether the judgment rendered in a condemnation case in which the parties stipulated that the value of an entire road should be determined therein, and the jury returned a verdict for the value of the entire road, precludes the owners of the road from recovering in this action for the reasonable and fair market value of the use of a portion of the road.

2. Whether the trial court erred in rendering a judgment based on the cost of construction of the entire road, less the amount previously received for its use, as the reasonable and fair market value of the use of one-third of the road, rather than basing it on the reasonable charge per cubic yard for such use.

#### STATEMENT

This appeal is from a judgment in suit brought under the Tucker Act in favor of appellees for \$5,816 based on the cost, less sums and credits previously received, of a certain private road owned by appellees but used by the United States for hauling sand and gravel in army trucks and other conveyances (R. 2-22, 54).

The facts of the case may be summarized as follows:<sup>1</sup>

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<sup>1</sup> The facts were agreed upon in a pre-trial conference on which an order was entered on March 19, 1947 (R. 32-40). This pre-trial

On April 11, 1942, appellee Gallagher entered into an agreement with Crown Zellerbach Corporation (R. 5-16, 48), in which he was granted, for a period beginning on that date and ending December 31, 1945, the right to take sand and gravel from Santiam Bar, which was owned by Crown Zellerbach Corporation. He was granted the further right to construct a private road upon its premises adjacent to the gravel bar for the purpose of transporting to market the sand and gravel produced. As part consideration for the sand and gravel purchased, this road was to be available to Crown Zellerbach Corporation and any other purchasers of sand and gravel from it, Gallagher to be reimbursed by the user on some reasonable basis for the use of the road, "such reimbursement to be at a reasonable royalty rate on a per cubic yard basis which would not be greater than a fair share or proportionate cost of constructing and maintaining such private road or roads" (R. 8). On April 13, 1942, Gallagher entered into an agreement with J. Ira McNutt and Earl L. McNutt (R. 17-22, 48), whereby Gallagher agreed to do certain things and the McNutts, among other things, agreed to install bunkers, machinery, and equipment on the gravel bar and to process sand and gravel from the bar. In order to construct the private road from the gravel bar to a public highway, it was necessary to procure easements across two pieces of intervening property, one owned by A. W. Crocker, the other by L. M. Gossler (R. 34, 35, 127). The road when completed was 1.8 miles

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order was amended by the court, on its own motion, in paragraph V of its Conclusions of Law (R. 54).

long, six-tenths of a mile being on the property of Crown Zellerbach Corporation (R. 130-131).

Between May 9, 1942, and June 20, 1942, appellees processed, washed, screened, and stock-piled and were the owners of 13,743 cubic yards of sand and gravel, which was then situated upon the Santiam Bar; between May 9, 1942, and October 1, 1942, they sold and removed 3,740 cubic yards of same over their road; and between July 1, 1942, and September 16, 1942, Strong and McDonald paid plaintiffs \$3,000 for the use of their road in moving 68,203 cubic yards of sand and gravel from Santiam Bar (R. 37, 51).

On November 18, 1942, Crown Zellerbach Corporation granted permission to the Government to remove sand and gravel from the Santiam Bar with the understanding that Gallagher's rights under their agreement of April 11, 1942, would be protected (R. 38, 51-52, 72-73). Between October 1, 1942, and August 19, 1944, the Government moved 66,643 cubic yards of sand and gravel over appellees' roadway from the Santiam Bar to Camp Adair (R. 37, 51).

In 1942, the United States condemned the land owned by Gossler and Crocker over which the road ran (R. 49, 50). The condemnation of the Gossler tract was tried beginning November 21, 1944, before Honorable James Alger Fee and a jury, the style of the case being *United States of America v. L. M. Gossler et al.*, Civil No. 1729, J. H. Gallagher and his wife being made parties defendant, and the McNutt Brothers intervening. The purpose of that trial was to assess the value of the Gallagher and McNutt interests in the Gossler land (R. 75). At that time,



a stipulation was entered into by all parties that they would try in that lawsuit the value of the entire road and the interest of<sup>1</sup> Gallagher and the McNutts in the gravel bar (R. 36-37, 76-77). The court instructed the jury that the United States is required to pay just compensation for the interests of these parties (R. 77, 120). On November 24, 1944, the jury returned the following verdict (R. 84, 116-117):

We, the jury, duly empaneled and sworn to try the above-entitled cause, do hereby find that *the full market value of defendants J. H. Gallagher, Belle K. Gallagher, his wife, Earl L. McNutt and J. Ira McNutt's interest in 1.8 miles of road* leading to the Santiam Bar and including damage to their interest in said bar, which interest exists under a contract from Crown Zellerbach arising from this proceeding as of June 18, 1942, was and is the sum of One Thousand Dollars (\$1,000), said roadway crossing, among other lands, a tract formerly owned by L. M. Gossler and Alta L. Gossler, his wife. [Italics supplied.]

A motion for new trial was filed in that case by Gallagher and the McNutts. Judge Fee rendered an opinion on April 2, 1945, denying a new trial (R. 78, 60 F. Supp. 971). Judgment on the verdict was entered for \$1,000, with interest at 6% per annum from June 18, 1942, until paid (R. 82-88). The sum of \$1,155 was deposited, and final judgment was entered ordering payment of the money to J. H. Gallagher and Belle K. Gallagher, his wife, and Earl L. McNutt and J. Ira McNutt, "in full satisfaction of said judgment and of all claims against the United

States of America for the taking of the estate above set forth in and to the above described lands," and vesting in the United States "full fee simple title" in and to the Gossler tract (R. 89-96), and such payments were received by the plaintiffs in the present suit (R. 50, 96).

The present suit was instituted on August 23, 1946, to recover damages for the use of the portion of the road located on the Crown Zellerbach property (R. 2-4). The judgment in the condemnation case was pleaded in the answer filed in the instant case (R. 27-30), and the United States filed a motion for judgment on the pleadings, based upon the plea that the former judgment constituted a bar to this action (R. 30-31). The court reserved its decision on the motion to the time of trial (R. 32).

At the trial of this case, before Honorable Claude McColloch, appellees offered evidence as to the cost of construction of the road, which was admitted over appellant's objection (R. 123); expense to McNutt Brothers for the work they did on the road, \$7,500 (R. 123-125); cost of easements from Crocker and Gossler to build the road \$1,190, and cost to Gallagher in building the pioneer road, over which the permanent road was constructed, \$1,500 (R. 127). Appellees also offered evidence to prove that a reasonable royalty for hauling over the entire road, 1.8 miles, was ten cents a cubic yard (R. 129). This value was testified to by appellee Gallagher, who stated that his opinion was based upon his contract with Strong and McDonald in 1942. That contract contemplated the hauling of 30,000 cubic yards of sand and gravel for

a lump sum payment of \$3,000, but Gallagher stated that Strong misrepresented the amount and hauled 68,000 cubic yards for that amount (R. 127-128). The Government's testimony placed the value of hauling over the six-tenths of a mile of the road located on the Crown Zellerbach property at two cents a cubic yard (R. 145).

On April 4, 1947, the court made findings of fact (R. 46-52), summarizing the above facts, and made the further finding that appellees' claim for the reasonable and fair market value of the use by the Government of the road was not submitted, considered or fully decided in the condemnation action relating to the Gossler land; that appellant was fully advised of appellees' interest in the road at the time it hauled 66,643 cubic yards of sand and gravel over it, and that appellant's use was not made under a claim of ownership thereof. The court concluded that appellant did not acquire ownership of that portion of plaintiff's road which was constructed upon the land owned by Crown Zellerbach Corporation; that appellees had a valid claim against appellant for the reasonable and fair market value of its use for hauling 66,643 cubic yards of sand and gravel over the road; that there was an implied contract to pay the reasonable and fair market value of the use thereof, and that judgment should be entered against appellant for \$5,816 (R. 53-54). The court filed the following memorandum opinion (R. 41):

It is doubtful, as Government counsel conceded at the trial, whether former adjudication bars the plaintiff. This leaves the equitable plea

of estoppel for consideration. I think it is not inequitable for plaintiff to recover his cost less sums and credits previously received. That figures out:

Cost.....		\$10, 190. 00
Less McDonald.....	\$3, 000. 00	
Verdict Gossler case.....	1, 000. 00	
Plaintiff's own use.....	374. 00	
		<hr/> 4, 374. 00
Judgment herein.....		<hr/> \$5, 816. 00

Judgment was duly entered and the Government took this appeal (R. 62).

#### STATEMENT OF POINTS RELIED UPON

The points relied upon by the United States (R. 64-65) are:

1. The district court erred in not holding that the entire interests of the appellees in the road were adjudicated in the condemnation action, *United States v. Gossler et al.*, Civil No. 1729, and that they are estopped from maintaining this action for the fair market value of the use of the road.

2. The district court erred in holding that the claim presented herein for the reasonable and fair market value of the use by the Government of the road belonging to appellees was not submitted, considered or fully decided in the case of *United States v. Gossler et al.*, Civil No. 1729.

3. The district court erred in holding that the appellees have a valid claim against the United States for the reasonable and fair market value of its use for hauling 66,643 cubic yards of sand and gravel over the road.



4. The district court erred in rendering a judgment in favor of appellees based on the cost of construction of the entire road, less the amount previously received for the use, as the reasonable and fair market value of the use of one-third of the road for hauling 66,643 cubic yards of sand and gravel.

5. The district court erred in admitting evidence of the construction cost of the entire road. The evidence and the objection appear at R. 123, in the testimony of Mr. Quigley, a witness for plaintiffs, as follows:

Q. Are you familiar with the cost of constructing the road, insofar as McNutt Brothers are concerned?

A. That is right; I am.

Q. What was the cost to McNutt Brothers of the work that they did on the road?

Mr. TWINING. I object to that, if your Honor please. I think this question is immaterial. There is no question here about the value of this road. It is not within the realm of the complaint and the pre-trial order. The whole thing is immaterial.

The COURT. How are you going to approach it? I suppose it could be done on a footage basis.

Mr. DEZENDORF. My theory is to show, first, the cost of the road, because I do not think it is practical to break down the cost of any particular part. My theory is that the cost of the whole road is the measuring stick which was laid down by the Crown Zellerbach Corporation and that that must be the measuring stick in this case. I understand the Government has a different theory.



The COURT. Admitted, subject to objection.

Q. (By Mr. Dezendorf): What was the expense to McNutt Brothers for the work that they did on the road?

A. \$7,500.

6. The district court erred in ignoring the undisputed evidence that the portion of the road included in the pleadings could not have cost in excess of \$3,000.

7. The district court erred in giving judgment of \$5,816 for the use by appellant in hauling 66,643 cubic yards of sand and gravel over six-tenths of a mile of road.

#### ARGUMENT

#### I

**Appellees' interests in the entire road were adjudicated in the condemnation action, and they are estopped from maintaining this action for the fair market value of the use of a portion of the road**

When the matter of fixing the value of appellees' interest in the section of their private road constructed over the Gossler land came before the court in the condemnation case, the parties entered into a stipulation "to try, all in this one lawsuit, the value of the road and of our interest in the gravel bar" (R. 76-77). At that time the court stated:

Well, that relieves the Court of some of the responsibility, because with this stipulation I take it that the parties can stipulate to try any questions that they want to. This is a stipulation to try out certain questions which may not technically be in the case, and I shall treat it as that (R. 76-77).

The court read the form of the verdict to the jury, which instructed them to find the full market value of appellees' "interest in 1.8 miles of road leading to the Santiam Bar and including damage to their interest in said bar." They rendered their verdict accordingly. In Judge Fee's opinion on the motion for new trial, 60 F. Supp. 971, 976, he called attention to the fact that after instructing the jury that the Government took the Crocker and Gossler lands and that the United States is required to pay just compensation therefor, he then instructed the jury as to the meaning of just compensation and fair market value, and added:

However, the theory of the defendants as the case developed at trial, extended far beyond compensation for such property interest. Briefly, it was that the United States must compensate defendants not only for these property interests but also for the failure of defendants to make a profit upon an apparent demand in the vicinity for gravel at the date of taking. \* \* \* The court said in part:

"Now, in this case I instruct you that there was no taking of sand or gravel by the Government, and you are not to allow any compensation for sand or gravel \* \* \* Neither will you consider the possible profit that might have been made in the sale of any sand or gravel, because there was no sand or gravel taken, and the Government is not required to pay for loss of a business proposition to anyone.

"The sole consideration for you is the fair market value of the Gallagher and McNutt property interests."

The court defined the property interests of defendants very broadly so that *they included not only the whole right of way*, but also the incorporeal right to take sand and gravel so far as connected therewith. The United States does not complain of this. The defendants cannot.

\* \* \* \* \*

Actually the court assumed that defendants would not be fairly compensated for their interest in this roadway across the Gossler lands unless the entire strip commencing at the gravel pits on Crown-Zellerbach lands and running to the county road, were evaluated. [Italics supplied.]

In the trial of the present case, the court had the entire record in the condemnation case before him, and Judge Fee's opinion on the motion for new trial, and it is difficult to understand how he could find that all of the interests of the parties were not settled in that case.<sup>2</sup> It is well settled that a cause of action finally determined between the parties on the merits by a court of competent jurisdiction cannot again be litigated by new proceedings before the same or any other tribunal. *Baltimore Steamship Co. et al., v. Phillips*, 274 U. S. 316 (1927); *Hummel v. Equitable Life Assurance Society*, 151 F. 2d 994 (C. C. A. 7,

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<sup>2</sup> In the instant case the court made a finding of fact that the plaintiffs' claim herein was not submitted, considered or fully decided in the condemnation action (R. 52). This is in truth, we submit, a question of law as to the effect of the condemnation judgment. In any event, the facts which appear from documentary evidence and the pre-trial agreement of the parties cannot support such a finding.

1945); *Viles et al., v. Prudential Insurance Co. of America*, 124 F. 2d 78 (C. C. A. 10, 1941), cert. den. 315 U. S. 816; *Boundary County, Idaho, et al., v. Woldson*, 144 F. 2d 17 (C. C. A. 9, 1944), cert. den. 324 U. S. 843; *Runyon v. Great Lakes Dredge & Dock Co.*, 141 F. 2d 396 (C. C. A. 6, 1944); *Bennett et al., v. Commissioner of Internal Revenue*, 113 F. 2d 837 (C. C. A. 5, 1940). The judgment in the condemnation action, being upon the merits, between the same parties as in the present action, the parties stipulating that they would try the whole matter in that one lawsuit, and that the jury should determine, the interest of the appellees in the entire 1.8 miles road and also the value of their interest in the Santiam Bar under their contract with Crown Zellerbach Corporation, constitutes a bar to the present action. In that case, a specific material fact was adjudicated: the interest of the parties in the entire road and the gravel bar, as of June 18, 1942. Therefore, that adjudication bars them in the present action from asserting a claim for the value of the use of a part of the road by the Government after that date.

In *Cromwell v. County of Sac*, 94 U. S. 351 (1876), the leading case upon this subject, it was held that where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. It seems clear that whether it be called *res judicata* or estoppel, the jury having determined the



interest of appellees in the entire road to be worth \$1,000 and the judgment of the court being for that amount, the court in the instant case was bound by that adjudication and could not find the value for the use of one-third of the road for two years to be more than the full value of the road. The finding by the jury that the entire interest of appellees in the road and gravel beds was \$1,000 is conclusive upon appellees, and since they have received that amount they are entitled to nothing more.

Apparently, the theory of the district judge in the present case was that this was a cause of action for the use of the road and the former case was for the value of the road. The test of whether this is the same cause of action is: could plaintiffs bring two causes of action, one for the value of the road and the other for the value of the use of the road? The district judge seems to answer this in the affirmative, but it is very apparent that when the Government paid the value of the road, it also paid for the use thereof, hence two actions could not be brought. *Winters v. Bisailon*, 153 Ore. 509, 57 P. 2d 1095 (Ore. 1936). Certainly in the present circumstances, there is no difference between taking the road and taking the use of the road. Similarly, in cases when the Government condemns property for temporary occupancy, rather than in fee simple, the compensation for the rental value has been referred to as "market rental value of the temporary occupancy taken" (*United States v. General Motors Corp.*, 323 U. S. 373, 382-383), or "the fair market value of the use" (*United*



*States v. 14.4756 Acres of Land in Christiana Hundred*, 71 F. Supp. 1005, 1008 D. Del. 1947). The identity of the two actions would be obvious if the condemnation proceeding had involved all three parcels. The fact that only the Gossler property was involved in the condemnation proceeding does not change the result, since the parties stipulated, as was only reasonable in the circumstances, that the claim for the entire 1.8 miles of road should be tried as a unit.

It cannot be said in support of the present judgment that the court in the condemnation proceeding lacked jurisdiction to determine the entire claim, for at least two reasons: First, appellees having consented to such procedure, not having appealed from the judgment, but instead having taken the proceeds thereof, cannot be heard to attack the proceeding. *United States v. Nudelman et al.*, 104 F. 2d 549 (C. C. A. 7, 1939), certiorari denied 308 U. S. 589. Secondly, the road obviously had to be treated as an entity and could not be broken down into the various segments. Thus, if the taking by condemnation of the part of the road over the Gossler land depreciated the usefulness and value of the six-tenths of a mile of the road on the Crown Zellerbach property, the owners were entitled to compensation for the damage to this remainder. *United States v. Welch*, 217 U. S. 333 (1910); *United States v. Grizzard*, 219 U. S. 180 (1911); *United States v. Chicago, B. & Q. R. Co.*, 82 F. 2d 131 (C. C. A. 8, 1936), cert. den. 298 U. S. 689; *United States v. Miller*, 317 U. S. 369 (1943). After such damages

were paid, all that was left was, at most, the bare legal title to a worthless easement.<sup>3</sup>

## II

**In any event, the trial court erred in rendering a judgment based on the cost of construction of the entire road, less the amount previously received for the use, as the reasonable and fair market value of the use of one-third of the road for hauling 66,643 cubic yards of sand and gravel**

*A. The construction cost of the entire road is not the proper measure of damages for the use of one-third thereof.*—Even if it be assumed that appellees are not barred nor estopped by the former judgment, the proper measure of just compensation was the fair cash market value of the use of the road at the time such use was taken. The judgment based upon construction costs has no relationship to market value. If the United States had hauled 100 or 1,000,000 yards of sand and gravel, it can be assumed that the judgment under that method of calculation would have been the same.

In the Court's opinion on motion for new trial in the condemnation case, 60 F. Supp. 971, 976, it said:

Improper measures of compensation such as the cost of the road on the granted right of way were entertained. Instructions embodying variations of these ideas were asked for and refused. The motion for new trial is based in

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<sup>3</sup> Appellees were not entitled even to nominal damages, because nominal damages are not recoverable under the Tucker Act. *Marion, Etc. Ry. v. United States*, 270 U. S. 280, 282 (1926).

part upon this refusal which it is claimed constituted error of law.

In the trial of the instant case, appellees were permitted to introduce evidence as to the cost of the entire 1.8 miles of road, to wit, \$10,190 (R. 125, 127). This amount included \$1,190 which was paid for easements across the Crocker and Gossler tracts, and could not have been a part of the cost of the part of the road on the Crown Zellerbach land. Thus, the testimony was that the actual road construction was \$9,000 and that the part crossing the Crown Zellerbach tract, the only portion included in the pleadings and pre-trial order in the present case, was \$3,000, since appellees' testimony was that all portions of the road cost relatively the same amount (R. 126). It is clear that the court based its judgment upon this testimony. This evidence is, of course, evidence of the cost of two sections of road not within the pleadings, and the entire cost was expended at a time several months prior to appellant's use of the Crown Zellerbach portion of the road. This is not evidence as to the reasonable value of the road at the time appellant made use of it, nor is it evidence of the fair and reasonable value of appellant's use.

Appellee, Gallagher, testified that the Crown Zellerbach portion constitutes one-third of the road (R. 130-131); therefore, from his testimony of the cost of the construction of the entire 1.8 miles, the construction cost of this one-third could not be in excess of \$3,000, and the maximum recovery, even on the

court's theory of valuation, would be \$3,000 less credits already received thereon,<sup>4</sup> as follows:

Cost of one-third of road	\$3,000.00
Less credit from Strong & McDonald	\$1,000.00
Less credit appellees' own use	124.66
Less credit from Gossler case, $\frac{1}{3}$ judgment with interest	385.00
	<hr/> 1,509.66
	<hr/> \$1,490.34

These considerations make it clear that while the court rejected the claims of *res judicata* and *estoppel*, apparently on the ground that this is a different segment of the road from that involved in the condemnation case, yet in arriving at the amount of its judgment it valued the entire road and not just the segment on the Crown Zellerbach land. We submit that appellees may not in this manner secure an additional award for the segment of the road which they have already been paid for in the previous case.

Moreover, it is well settled that the Fifth Amendment does not guarantee a return upon the owner's investment and that, therefore, compensation cannot be measured by cost of the property taken. *United States ex rel. T. V. A. v. Powelson*, 319 U. S. 266 (1943); *Kinter v. United States*, 156 F. 2d 5 (C. C. A. 3, 1946).

*B. The proper measure of recovery under the Tucker Act for the use of six-tenths of a mile of the road would be a reasonable hauling charge per cubic yard.*—Appellees testified that a fair, reasonable haul-

<sup>4</sup> The court's own computation is erroneous, since it failed to deduct the interest of \$155 which was paid on the judgment, as one of the credits from the cost of construction of the road.



ing charge per cubic yard on this particular road, under the conditions in that community and the prices prevailing would be ten cents per cubic yard over the entire 1.8 miles of road (R. 129-130). This would make the charge  $3\frac{1}{3}$  cents per cubic yard over the .6 mile of the road on the Crown Zellerbach land. Appellant's witness, Mr. Shull, testified (R. 145):

I would say two cents a yard would be a fair royalty, on just that short section of six-tenths of a mile.

The result of the court's judgment in this case is to charge the Government almost nine cents per cubic yard for the use of the entire road, and only one-third of the road was before the court. This is not supported by the evidence, as was just pointed out. Moreover, Mr. Forsman, who was Assistant Executive Officer of Camp Adair, during the time the road was used by the Army, testified (R. 132-133) that when the Army started using the road in October 1942, it was in poor condition and the Army had to rebuild it before it could begin hauling gravel for the Camp as there had been a flood, and that the Army maintained the road during the time it hauled the 68,000 yards of gravel. Appellees cannot rely upon their contract with Crown Zellerbach to support the present judgment, as they attempted to do in the court below (R. 80-81). That contract provides that Gallagher should be reimbursed "on some reasonable basis for the use of such private roads; such reimbursement to be at a reasonable royalty rate on a per-cubic yard basis which would not be greater than a fair share or



proportionate cost of constructing and maintaining such private road or roads." Thus, the contract provides for a reasonable price per cubic yard, with a maximum limit of recovery of the cost of the road. Since the royalty basis would only result in an award of some \$2,221.00, based on Gallagher's own valuation of ten cents per cubic yard, it cannot support the judgment of \$5,816.

#### CONCLUSION

For the foregoing reasons, it is submitted that the judgment appealed from should be reversed.

Respectfully,

A. DEVITT VANECH,  
*Assistant Attorney General.*

HENRY L. HESS,  
*United States Attorney, Portland, Oregon.*

ROGER P. MARQUIS,  
ELIZABETH DUDLEY,  
*Attorneys, Department of Justice, Washington, D. C.*

JANUARY 1948

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No. 11733

**In the United States  
Circuit Court of Appeals  
FOR THE NINTH CIRCUIT**

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UNITED STATES OF  
AMERICA,

Appellant,

v.

J. H. GALLAGHER, J. IRA  
McNUTT, and Earl L. McNUTT,  
Appellees.

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**BRIEF OF APPELLEES**

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Upon Appeal from the District Court of the  
United States for the District of Oregon

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LAWRENCE T. HARRIS,  
201 Miner Building,  
Eugene, Oregon,

KOERNER, YOUNG, SWETT & MCCOLLOCH,  
JAMES C. DEZENDORF,  
800 Pacific Building,  
Portland 4, Oregon,  
Attorneys for Appellees.



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**In the United States  
Circuit Court of Appeals  
FOR THE NINTH CIRCUIT**

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UNITED STATES OF  
AMERICA,

v. Appellant,

J. H. GALLAGHER, J. IRA  
McNUTT, and Earl L. McNUTT,  
Appellees.

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**BRIEF OF APPELLEES**

---

Upon Appeal from the District Court of the  
United States for the District of Oregon

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**STATEMENT OF THE CASE**

**A. Facts giving rise to this Tucker Act Claim.**

On April 11, 1942, Appellee Gallagher entered into a written contract with Crown Zellerbach Corporation whereby Crown Zellerbach granted to Appellee Gallagher the right for a period beginning April 11, 1942, and extending to and including the 31st day of December, 1945, to take sand and gravel from the Santiam Bar

adjacent to and on the westerly side of the Willamette River in Benton County, Oregon (R. 5, 33, 48, 97).

On April 13, 1942, Appellee Gallagher and Appellees McNutts entered into a written contract whereby Appellee Gallagher agreed to do certain things and Appellees McNutts agreed, among other things, to install bunkers, machinery and equipment on the gravel bar and to process sand and gravel from the Bar. The profits of the venture were to be divided between Appellee Gallagher and Appellees McNutts (R. 17, 34, 48, 110).

In order to have access to the Santiam gravel bar to take in the equipment necessary to process sand and gravel and to transport sand and gravel produced to market, it was necessary for Appellees to build a road 1.8 mile long from the county road—first across land owned by the Crockers, then across land owned by the Gosslers and finally across land owned by Crown Zellerbach Corporation (R. 34, 49).

Appellees procured (R. 35, 49) and recorded (R. 135) appropriate easements upon which to construct their road from the Crockers and the Gosslers and the contract between Appellee Gallagher and Crown Zellerbach Corporation granted an easement to construct a road over its property lying between the Santiam Bar and the Gossler property (R. 7, 99).

Between April 13, 1942, and June 18, 1942, Appel-

lees constructed their road from the county road to the Santiam Bar (R. 34, 49) and processed, washed, screened and stockpiled upon the Santiam Bar 13, 743 cubic yards of sand and gravel (R. 37, 51).

In the contract of April 11, 1942, between Crown Zellerbach Corporation and Appellee Gallagher, Crown Zellerbach reserved the right to sell sand and gravel located on the Santiam Bar to others (R. 14, 107). The contract also provided that the road to be built by Appellees from the county road across the Crocker land, the Gossler land and the Crown Zellerbach land should be available to any persons to whom Crown Zellerbach might sell sand and gravel from the Bar :

“\* \* \* provided \* \* \* such persons \* \* \* shall reimburse the Purchaser (Appellees) on some reasonable basis for the use of such private roads; such reimbursement to be at a reasonable royalty rate on a per cubic yard basis which would not be greater than a fair share or proportionate cost of constructing and maintaining such private road or roads, taking into consideration the yardage of sand and gravel being hauled by the Purchaser (Appellees) and the yardage of sand and gravel to be hauled by the Seller or such persons, firms or corporations to whom it might sell sand and gravel.” (R. 8, 100)

Between May 9, 1942, and October 1, 1942, Appellees sold and removed from their stockpiles on the Santiam



Bar and transported over their road 3,740 cubic yards of sand and gravel (R. 37, 51).

Prior to July 1, 1942, Crown Zellerbach Corporation granted to Strong and McDonald the right to remove sand and gravel from the Santiam Bar. Strong and McDonald then negotiated with Appellees for the use of their road and paid Appellees \$3,000.00 (R. 37, 51) on the representation that they wished to take 30,000 cubic yards from the Bar over Appellees' road. The \$3,000.00 figure was arrived at by charging 10c a cubic yard for the 30,000 cubic yards which Strong and McDonald said they desired to take out over the road (R. 127, 128).

As it turned out, between July 1, 1942, and September 16, 1942, Strong and McDonald moved 68,203 cubic yards of sand and gravel from the Santiam Bar over Appellees' road (R. 37, 51).

On November 18, 1942, Crown Zellerbach Corporation granted permission to the United States Army to remove sand and gravel from the Santiam Bar (R. 38, 51, 72), which grant provided:

"It should be understood, of course, that the rights of Mr. J. H. Gallagher of Corvallis, Oregon under an agreement of April 11, 1942 between the said Gallagher and the undersigned Corporation, a copy of which agreement is in your possession, will be protected." (R. 72, 79).

Between October 1, 1942, and August 19, 1944, the United States Army, without negotiating with or arranging for payment to Appellees for its use of the road as required by Appellees' contract with Crown Zellerbach Corporation, moved 66,643 cubic yards of sand and gravel from the Santiam Bar over Appellees' road (R. 38, 51, 133).

The United States Army was fully advised of Appellees' interest in their road at the time the road was used by it in hauling 66,643 cubic yards of sand and gravel thereon and the United States Army's use thereof was not made under a claim of ownership (R. 52, 134).

Appellees' road cost \$10,190.00 (R. 52, 123, 127). Appellee Gallagher testified that 10c a cubic yard or \$6,664.30 was the reasonable and fair market value of Appellant's use of the road (R. 127, 130).

The trial court found that \$5,816.00 was the reasonable and fair market value of Appellant's use of the road and entered judgment in Appellees' favor and against Appellant in that amount (R. 52, 54).

#### **B. The condemnation action relating to the Gossler land.**

On June 18, 1942 (R. 35, 49) (after Appellees had completed the construction of their road) by appropriate orders in proceedings filed in the court below, the United States was granted possession of the Gossler

and Crocker lands upon which approximately two-thirds of Appellees' road was constructed.

The United States never procured, through legal proceedings, an order for possession of the property owned by Crown Zellerbach Corporation adjacent to the Santiam Bar upon which Appellees had constructed the balance of their road (R. 35, 49).

Appellee Gallagher was joined as a defendant in the condemnation action relating to the Gossler land and during the course of said action Appellees McNutts intervened (R. 35, 50). None of Appellees were joined in the condemnation action relating to the Crocker land (R. 35, 50).

On October 5, 1942, the United States filed declarations of taking, accompanied by deposits of appropriate funds, in the Gossler and Crocker condemnation actions (R. 35, 50).

On November 21, 1944 (after the United States Army had used Appellees' road to take 66,643 cubic yards of sand and gravel from the Santiam Bar, without having paid Appellees anything for such use), the condemnation action to determine the value of Appellees' interest in the Gossler land came on regularly for trial in the court below (R. 35, 50).

By various motions and proceedings prior to the trial

of the condemnation action relating to the Gossler land, the United States took the position that all it had to do in the Gossler case was to pay Appellees the replacement cost of approximately one-third of their road which was constructed on the Gossler property (R. 135, 136).

At the commencement of the trial, however, counsel for the Government stated that they would not object to testimony showing the value of the entire road (R. 36). It was thereupon stipulated that the value of Appellees' interest in the entire road should be tried (R. 36).

When it came time to instruct the jury, the trial judge submitted only the question of the value of Appellees' interest in the Crocker and Gossler lands and not their interest in the Crown Zellerbach land, saying :

“On June 18, 1942, the Government took the Crocker and Gossler lands and the Gallagher and the McNutt brothers' interest therein. As a result of this taking of these interests the United States is required to pay just compensation. \* \* \* The sole consideration for you is the fair market value of the Gallagher and McNutt property interests. You will, then, not take into consideration in your deliberations the cost of construction of the road over either of the pieces of property, or the purchase price of the right-of-way, but only the fair market



value of the interest of McNutt and Gallagher as of the date June 18, 1942.” (R. 77, 78).

A form of verdict providing for the insertion of an amount to cover the full market value of Appellees’ interest in 1.8 mile of road leading to the Santiam Bar, said road crossing, among other lands, a tract formerly owned by the Gosslers, was submitted to the jury (R. 84) and it returned a verdict for \$1,000.00 upon which judgment was entered (R. 82).

Because Appellees did not feel that the instructions of the trial court had submitted to the jury the value of their interest in the whole road and for various other reasons, they filed a motion for new trial (R. 136, 137). At the conclusion of the argument of the motion for new trial in the Gossler case, the trial court said :

“I think the Court will not pass on the question whether or not the Tucker Act cases were involved in this matter, and whether the verdict was on those cases or not. That would be a question in another lawsuit.” (R. 78)

Then referring to the Gossler case, the Court said :

“As I take it, that involved simply the trial as to the value of this easement over a particular piece of land. \* \* \* It is true that the Court did not submit to the jury the value of the easement over other lands, \* \* \*.” (R. 78)



In the written opinion handed down by the trial judge on the motion for new trial in the Gossler case, the court said:

“If in some other case, the defendants (appellees) contend that for jurisdictional reasons the interests were not legally so submitted, the question of the effect of the stipulation and this judgment can be thus considered and the rules of *res judicata* applied.” (R. 138)

**C. The issues submitted and the findings of the trial court.**

In the court below Appellant contended in its pleadings that the claim asserted in the complaint had been adjudicated, fully paid and satisfied in the condemnation action relating to the Gossler land (R. 28, 29).

Following the pretrial conference a pretrial order was entered submitting for determination the following issues (R. 38, 39):

“I

“Whether the Defendant (Appellant) herein acquired ownership of that portion of Plaintiffs’ (Appellees’) road which was constructed upon land owned by Crown Zellerbach Corporation in the condemnation action relating to the Gossler land.

## “II

“Assuming the Defendant (Appellant) herein acquired ownership of that portion of Plaintiff’s (Appellees’) road which was constructed upon land owned by Crown Zellerbach Corporation, whether it acquired title to the Crown Zellerbach portion of the road prior to November 21, 1944.

## “III

“Assuming either (1) the Defendant (Appellant) did not acquire ownership of that portion of Plaintiffs’ (Appellees’) road which was constructed upon land owned by Crown Zellerbach Corporation in the condemnation action relating to the Gossler land, or (2) that defendant (Appellant) acquired title to the Crown Zellerbach Corporation portion of the road on November 21, 1944, whether plaintiffs (Appellees) have a valid claim against the defendant (Appellant) for hauling 66,643 cubic yards of sand and gravel over that portion of their road constructed upon the land owned by Crown Zellerbach Corporation.

## “IV

“Assuming Plaintiffs (Appellees) have a valid claim against the defendant (Appellant) for its use of that portion of their road constructed upon the

land owned by Crown Zellerbach Corporation, the amount which Plaintiffs (Appellees) are entitled to recover from Defendant (Appellant).”

In determining the issues submitted for its consideration, the trial court had before it the whole record in the Gossler condemnation action, including the pleadings, the testimony, the exhibits, the instructions, the verdict and the judgment, together with the motion for new trial and the opinion and order thereon (R. 135, Appellant’s Brief p. 12).

It thereupon rejected Appellees’ defense and found as a fact:

“Plaintiffs’ (Appellees’) claim presented herein for the reasonable and fair market value of the use by the Government of their road was not submitted, considered or fully decided in the condemnation action relating to the Gossler land.” (Finding XIX, R. 52)

The trial court further found that the reasonable and fair market value of Appellant’s use of Appellees’ road was and is the sum of \$5,816.00, upon which judgment was entered (R. 52, 54).

While the full record in the Gossler condemnation action was before the trial court, it has not been included in the record on appeal herein. The portions of the rec-

ord in that case which are in this record on appeal show that the value of the whole road was not submitted by the trial court to the jury in its instructions (R. 77) and that the trial court did not consider that the value of the whole road was so submitted (R. 78).

Thus it appears that the trial court which heard the Gossler condemnation action and the trial court which heard and determined this action below have both determined that the claim asserted herein has not been submitted, considered or decided in any other action.

## **. PROPOSITIONS OF LAW INVOLVED**

### **I**

Since the whole record in the condemnation action relating to the Gossler land was before the court below and was considered by it in making its Findings of Fact and since said record is not included in the record on appeal herein, Appellant may not attack the findings of fact on this appeal.

*Lubetich v. United States*, 315 U. S. 57, 62 S. Ct. 449, 86 L. ed. 677.

*Griffiths Dairy v. Squire* (C.C.A. 9th), 138 F. (2d) 758.

*Petition of Gogate* (C.C.A. 3rd), 126 F. (2d) 1020.

*Sublette v. Servel* (C.C.A. 8th), 124 F. (2d) 516.

*United States v. Foster* (C.C.A. 9th), 123 F. (2d) 32.

*Boyle v. United States* (C.C.A. 9th), 149 F. (2d) 201.

Federal Rules of Civil Procedure, Rule 52 (a), 28 U.S.C.A., following Section 723c.

Since no condemnation action was ever filed relating to the Crown Zellerbach Corporation property and Appellees were not joined in the condemnation action relating to the Crocker land and no Tucker Act case prior to this one was ever filed to recover the value of the Government's use of Appellees' road, Appellant never acquired title to the whole road and Appellees are entitled to recover.

(a) The only way the Government can acquire title to real property without a voluntary conveyance is by a condemnation proceeding or by payment of a judgment recovered by the land owner in a Tucker Act case.

*United States v. Lynah*, 188 U. S. 445, 23 S. Ct. 349, 47 L. ed. 539.

(b) Where one entitled to exercise the right of eminent domain enters upon land without first compensating the owner, the owner may sue for the value of the land and upon payment of the judgment a grant of the land for public use is effected.

*United States v. Portneuf-Marsh Valley Irr. Co.*, 205 Fed. 416.

(c) Where one entitled to exercise the right of eminent domain enters upon land without first compensating the owner, the owner may sue for the value of his



land and also for the value of its use pending determination of the value of the land and payment of the award.

*Fletcher v. Delaware L. & W. R. Co.* (C.C.A. 2d), 79 F. (2d) 306.

*Sanders v. Portland & O. C. Ry. Co.*, 98 Ore. 620, 193 Pac. 660.

*United States v. Certain Parcels of Land at Hempstead, etc.* (D. C., E. D. N. Y.), 51 F. Supp. 726.

(d) The Government's possession and use of property without making a deposit under the Declaration of Taking Act or payment of a judgment in a condemnation action does not pass title to the Government. Title passes as of the date of the filing of the declaration of taking or if no declaration of taking is filed, as of the date of payment of the judgment.

*United States v. Certain Parcels of Land, etc.* (D. C. D. Md.), 61 F. Supp. 164.

*United States v. Certain Parcels of Land at Hempstead, etc.* (D. C., E. D. N. Y.), 51 F. Supp. 726.

(e) Under the Oregon constitution, one authorized to acquire property by the exercise of the power of eminent domain does not acquire title until payment of the judgment and then as of the date of payment and not as of date of filing the proceeding.

*City of Salem v. Marion County*, 171 Ore. 254, 137 P. (2d) 977.

(f) In condemnation proceedings title passes when

the declaration of taking is filed and appropriate deposit is made and not when possession is taken.

*United States v. 150.29 Acres of Land, etc, in Milwaukee C., Wis.* (C.C.A. 7th), 135 F. (2d) 878.

(g) If no declaration of taking is filed, title passes when the condemnation judgment is paid.

*United States v. Bouchard* (C.C.A. 2d), 64 F. (2d) 482.

*Barnidge v. United States* (C.C.A. 8th), 101 F. (2d) 295.

(h) One not joined in a condemnation proceeding is not bound by the proceeding and loses no rights thereby. A Tucker Act case is the proper method of securing compensation.

*United States v. Certain Parcels of Land* (D.C.D. Md.), 40 F. Supp. 436.

*Phillips v. United States* (C.C.A. 7th), 151 F. (2d) 645.

## ARGUMENT

**Since the evidence upon which the trial court's findings of fact were made is not included in the record on appeal, Appellant may not attack them.**

The Government's defense to this action, which was asserted in its answer, was that the claim asserted in the Complaint had been adjudicated, fully paid and satisfied in the condemnation action relating to the Gossler land (R. 28, 29). This defense raised issues of fact as to

what was submitted by the parties for determination, as to what was submitted by the court to the jury for determination and as to what was decided in the Gossler action.

In order to determine these fact issues, the trial court had before it the whole record in the Gossler condemnation action, including the pleadings, the exhibits, the testimony, the instructions, the verdict and the judgment, including the motion for new trial, the trial court's comments at the time the motion was argued and its opinion on the motion for new trial (R. 135, Appellant's Brief, p. 12).

The record in the Gossler condemnation action has not been made a part of the record on appeal herein so that Appellant is not in a position to challenge the trial court's finding:

“Plaintiff's (Appellees') claim presented herein for the reasonable and fair market value of the use by the Government of their road was not submitted, considered or fully decided in the condemnation action relating to the Gossler land.” (Finding XIX, R. 52)

The authorities are unanimous in holding that an appellate court may not review a finding of fact made in the trial court where the evidence upon which the trial court based its finding is not a part of the record on appeal.

The authorities upon which we rely to support our position in this regard are cited on Page 12 herein under Appellees' Proposition of Law I.

**Since no condemnation action was ever filed relating to the Crown Zellerbach Corporation property and Appellees were not made parties to the condemnation action relating to the Crocker land and no other Tucker Act case to recover the value of the Government's use of Appellees' road has ever been filed, the Government never acquired title to the whole road and Appellees are entitled to recover.**

It is one of the agreed facts in this case that :

“Defendant (Appellant) has never procured, through legal proceedings, an order for possession of the property owned by Crown Zellerbach adjacent to the Santiam Bar, upon which Plaintiffs' (Appellees) constructed the balance of their road.”  
(R. 35)

The only way the Government can acquire title to real property without a conveyance is by condemnation proceedings or by payment of a judgment recovered by the land owner in a Tucker Act case.

*United States v. Lynah*, 188 U. S. 445, 23 S. Ct. 349, 47 L. ed. 539.

If the Government had condemned all three parcels of property, including the Crown Zellerbach Corporation property, the Gossler land and the Crocker land, upon which Appellees' road was constructed, then Appellees



would have no claim for the Government's use of any portion of their road after declarations of taking were filed, supported by deposits of appropriate funds, or if no declaration of taking were filed after payment of judgments in the condemnation actions. <sup>1</sup>

Since Appellees were joined as defendants only in the condemnation action relating to the Gossler land and their road extended over two other pieces of property, the Government was not in a position to acquire title to the portions of the road constructed upon the Crown Zellerbach property and upon the Crocker property without some other proceeding being filed. <sup>2</sup>

At the time the condemnation action relating to the Gossler land came on for trial, Appellees therefore had three separate and distinct Tucker Act claims in addition to their right to compensation in the Gossler condemnation action.

First—since Appellees were not joined as parties in the condemnation action relating to the Crocker land, although their easement from the Crockers was of rec-

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<sup>1</sup> *United States v. Certain Parcels of Land, etc.* (D. C. D. Md.), 61 F. Supp. 164; *United States v. Certain Parcels of Land at Hempstead, etc.* (D. C., E. D. N. Y.), 51 F. Supp. 726.

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<sup>2</sup> *United States v. 150.29 Acres of Land, etc. in Milwaukee C., Wis.* (C.C.A. 7th), 135 F. (2d) 878; *United States v. Bouchard* (C.C.A. 2d), 64 F. (2d) 482; *Barnidge v. United States* (C.C.A. 8th), 101 F. (2d) 295; *United States v. Certain Parcels of Land* (D. C. D. Md.), 40 F. Supp. 436; *Phillips v. United States* (C.C.A. 7th), 151 F. (2d) 645.



ord and their road thereon had been built, they had a Tucker Act claim against the United States for the reasonable and fair market value of their interest in the Crocker land.<sup>3</sup>

Second—they also had another Tucker Act claim for the reasonable and fair market value of the use made by the Government of their road upon the Crocker land up to the time of payment for their interest in the Crocker land.<sup>4</sup>

Third—since the Government did not attempt to condemn the Crown Zellerbach Corporation portion of the road and their use of the road was made with knowledge of Appellees' ownership of the road, Appellees had a Tucker Act claim for the reasonable and fair market value of the use made by the Government of their road on the Crown Zellerbach Corporation property.

Appellant does not claim that evidence was introduced in the Gossler condemnation action concerning the use made by the Government between October 1, 1942, and August 19, 1944, of Appellees' road in removing 66,643 cubic yards of sand and gravel from the Santiam Bar. No such evidence was submitted or considered by the

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<sup>3</sup> *United States v. Certain Parcels of Land* (D. C. D. Md.), 40 F. Supp. 436; *Phillips v. United States* (C.C.A. 7th), 151 F. (2d) 645.

<sup>4</sup> *Fletcher v. Delaware L. & W. R. Co.* (C.C.A. 2d), 79 F. (2d) 306; *Sanders v. Portland & O. C. Ry. Co.*, 98 Ore. 620, 193 Pac. 660; *United States v. Certain Parcels of Land at Hempstead, etc.* (D. C., E. D. N. Y.), 51 F. Supp. 726.

jury in the condemnation action relating to the Gossler land.

Appellant's position is that the Government cannot be required to pay Appellees for their road and then pay for the use thereof (Appellant's Brief P. 14).

The Government's argument in this regard raises the question as to when title passes to the Government and whether the land owner may recover for the use of his land prior to the Government's acquisition of title.

Obviously, if the Government had paid Appellees for their interest in the Crown Zellerbach land, in the Gossler land and in the Crocker land *before* it made use thereof, or if condemnation actions had been filed in which Appellees were joined as parties covering all three parcels of land and declarations of taking had been filed, accompanied by deposits of appropriate funds, then Appellees could not recover for use made by the Government of their road after payment therefor or after the declarations of taking were filed.

It must be conceded that since the Government filed an appropriate condemnation action with relation to the Gossler land in which Appellees were joined as defendants and in which case a declaration of taking was filed, accompanied by the deposit of appropriate funds, that the Government acquired Appellees' interest in the

Gossler land as of October 5, 1942, when the declaration of taking was filed.

However, since Appellees were *not* joined as parties in the condemnation action relating to the Crocker land and since no prior Tucker Act claim has ever been filed with respect to it, their interest therein had not been acquired when the Government made use of the road between October 1, 1942, and August 19, 1944, in removing 66,643 cubic yards of sand and gravel from the Santiam Bar.

In addition, since no condemnation action was ever filed with relation to the Crown Zellerbach portion of the property and no prior Tucker Act claim has ever been filed with respect to the Government's use of Appellees' road upon the Crown Zellerbach property, they are clearly entitled to recover for the Government's use of the Crown Zellerbach portion of the road.

If it be assumed (the possibility of which assumption we expressly deny) that Appellees' interest in their road over the Crocker land and over the Crown Zellerbach land were submitted for determination by virtue of the stipulation made on November 21, 1944, when the condemnation action relating to the Gossler land came on for trial, the Government at the final conclusion of that case and upon payment of the award would acquire

title to Appellees' interest in the Crocker land and in the Crown Zellerbach land *as of the date of payment of the judgment and not before.*<sup>5</sup>

Since the Government's use of Appellees' road was made prior to November 21, 1944, and prior to payment of the award in the condemnation case relating to the Gossler land, the Government would still be liable to the owners for the use made of the Crown Zellerbach and Crocker portions of their road prior to its acquisition of the title thereto.<sup>6</sup>

Where one entitled to exercise the power of eminent domain enters upon land without first compensating the owner, the condemning authority does not acquire title to the property involved until payment of the award and

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<sup>5</sup> *United States v. Certain Parcels of Land, etc.* (D. C. D. Md.), 61 F. Supp. 164; *United States v. Certain Parcels of Land at Hempstead, etc.* (D. C., E. D. N. Y.), 51 F. Supp. 726; *City of Salem v. Marion County*, 171 Ore. 254, 137 P. (2d) 977; *United States v. 150.29 Acres of Land, etc. in Milwaukee C., Wis.* (C.C.A. 7th), 135 F. (2d) 878; *United States v. Bouchard* (C.C.A. 2d), 64 F. (2d) 482; *Barnidge v. United States* (C.C.A. 8th), 101 F. (2d) 295; *United States v. Certain Parcels of Land* (D. C. D. Md.), 40 F. Supp. 436.

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<sup>6</sup> *Fletcher v. Delaware L. & W. R. Co.* (C.C.A. 2d), 79 F. (2d) 306; *Sanders v. Portland & O. C. Ry. Co.*, 98 Ore. 620, 193 Pac. 660; *United States v. Certain Parcels of Land at Hempstead, etc.* (D. C., E. D. N. Y.), 51 F. Supp. 726.



the title so acquired is as of the date of payment and not as of the date of the filing of the proceeding.<sup>7</sup>

The owner still possesses a claim for the reasonable and fair market value of the condemning authority's use of its land made up to the time when the award is made and title vests in the condemning authority.<sup>8</sup>

It is apparent, therefore, that even if it be assumed that Appellees submitted for determination in connection with the condemnation action relating to the Gossler land, the value of their interest in the portions of their road constructed upon the Crown Zellerbach land and upon the Crocker land that the Government did not acquire title to the Crown Zellerbach segment or to the Crocker segment, which aggregated two-thirds of the

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<sup>7</sup> *United States v. Certain Parcels of Land, etc.* (D. C. D. Md.), 61 F. Supp. 164; *United States v. Certain Parcels of Land at Hempstead, etc.* (D. C., E. D. N. Y.), 51 F. Supp. 726; *City of Salem v. Marion County*, 171 Ore. 254, 137 P. (2d), 977; *United States v. 150.29 Acres of Land, etc. in Milwaukee Co., Wis.* (C.C.A. 7th), 135 F. (2d) 878; *United States v. Bouchard* (C.C.A. 2d), 64 F. (2d) 482; *Barnidge v. United States* (C.C.A. 8th), 101 F. (2d) 295; *United States v. Certain Parcels of Land* (D. C. D. Md.), 40 F. Supp. 436.

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<sup>8</sup> *Fletcher v. Delaware L. & W. R. Co.* (C.C.A. 2d), 79 F. (2d) 306; *Sanders v. Portland & O. C. Ry. Co.*, 98 Ore. 620, 193 Pac. 660; *United States v. Certain Parcels of Land at Hempstead, etc.* (D. C., E. D. N. Y.), 51 F. Supp. 726.



length of Appellees' road, until November, 1944, which was after the Government's use of Appellees' road.

Therefore, even if it be assumed that Appellees' interest in the whole road was submitted in the Gossler case, Appellees are entitled to recover in this proceeding the reasonable and fair market value of the Government's use of two-thirds of their road prior to the Government's acquisition of title thereto.

**The evidence supports the amount of the trial court's award.**

In its brief Appellant assails the trial court's finding of fact that the reasonable and fair market value of its use of Appellees' road was and is the sum of \$5,816.00 (R. 52).

Appellant complains that the trial court took Appellees' cost of constructing the road into consideration in reaching its award.

However, the contract between Crown Zellerbach Corporation and Appellee Gallagher of April 11, 1942 (R 5, 97), provides that any other party to whom Crown Zellerbach might grant the right to take sand and gravel from the Santiam Bar would be entitled to use Appellees' road only if they reimbursed Appellees on a reasonable royalty rate on a per cubic yard basis not greater than a fair share or proportionate cost of constructing and maintaining such road, taking into consideration the yardage of sand and gravel hauled by Ap-

pellees and the yardage of sand and gravel hauled by such other person (R. 8, 100).

The Government acquired the right from Crown Zellerbach to take gravel from the Santiam Bar with the distinct and express understanding that Appellees' rights under their contract of April 11, 1942, would be protected (R. 38, 52, 72).

The cost of the road, the use made thereof by Appellees in removing sand and gravel from the Santiam Bar over the road, the amount paid by Strong and McDonald as reimbursement to Appellees in connection with their use of the road—all were pertinent factors to be taken into consideration in determining the amount which the Government should pay for its use of the road, since Appellees were limited by their contract with Crown Zellerbach to recovery of the cost of their road taking into consideration their own use thereof.

In any event, Appellees' testimony introduced in the court below is to the effect that 10c a cubic yard was the reasonable and fair market value of the use of the road made by the Government. Since the Government took out 66,643 cubic yards over the road, the evidence sustains a recovery of more than was allowed by the trial court.

Appellant's only testimony is to the effect that 2c a yard would be a fair royalty for the use of six-tenths of a mile, which was the Crown Zellerbach segment of the road. Appellant has entirely overlooked the fact that

Appellees are entitled to be compensated for the Government's use of the Crocker segment of the road which use was made prior to the payment of the award in the condemnation action relating to the Gossler land.

The Government therefore submitted no testimony relating to the reasonable and fair market value of the use made by the Government of that portion of Appellees' road which was not owned by it at the time its use was made.

It is apparent therefore that the trial court's finding as to the amount Appellees are entitled to recover should be sustained.

## CONCLUSION

Appellant's failure to include in this record the record in the condemnation action relating to the Gossler land has deprived it of the right to challenge the trial court's finding of fact based upon a review of the record in the Gossler condemnation action. Since the trial court found that Appellees' claim asserted herein was not submitted, considered or decided in the condemnation action relating to the Gossler land, the judgment appealed from must be affirmed. In any event, the Government did not acquire title to two-thirds of Appellees' road until after it had used it. The Government is therefore obligated to

pay for its use prior to acquisition of title thereto and the judgment appealed from must be affirmed.

Respectfully submitted,

LAWRENCE T. HARRIS,  
201 Miner Building,  
Eugene, Oregon,

KOERNER, YOUNG, SWETT & MCCOLLOCH,  
JAMES C. DEZENDORF,  
800 Pacific Building,  
Portland 4, Oregon,

*Attorneys for Appellees.*





No. 11733

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**In the United States Circuit Court of Appeals  
for the Ninth Circuit**

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UNITED STATES OF AMERICA, APPELLANT

v.

J. H. GALLAGHER, J. IRA McNUTT, AND EARL L.  
McNUTT, APPELLEES

---

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE DISTRICT OF OREGON

---

**REPLY BRIEF FOR THE UNITED STATES**

---

A. DEVITT VANECH,  
*Assistant Attorney General.*

HENRY L. HESS,  
*United States Attorney,  
Portland, Oregon.*

ROGER P. MARQUIS,  
ELIZABETH DUDLEY,  
*Attorneys, Department of Justice,  
Washington, D. C.*

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FILE

DEC 1 1913

PAUL C. GIBSON



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REPLY BRIEF FOR THE UNITED STATES

---

For convenience of reference, the arguments advanced by appellees will be discussed under the appropriate headings of appellant's main brief.

ARGUMENT

I

Appellees' interests in the entire road were adjudicated in the condemnation action, and they are estopped from maintaining this action for the fair market value of the use of a portion of the road

*A. Appellees' contention that the condemnation judgment did not include compensation for the use of the road between October 1, 1942 and August 19, 1944*



*is without merit.*—Appellees assert (Br. 18–19) that they had three distinct Tucker Act claims “in addition to their right to compensation in the Gossler condemnation action.” First, for the market value of their interest in the Crocker land; second, for the market value of the use made by the Government of the road upon the Crocker land up to the time of payment for their interest in the Crocker land; and third, for the value of the use made by the Government of the road on the Crown Zellerbach Corporation property. Appellees further assert (Br. 17–18) that since no declaration of taking was filed, title to the interest in the road did not pass until payment of the judgment. It is asserted that in the condemnation proceeding the Government would acquire appellees’ interest in the Crocker land and the Crown Zellerbach land “as of the date of the payment of the judgment and not before” (Br. 22). Appellees conclude that they are entitled to recover the value of the use made of their land up to the time the award was paid (Br. 22–23).

All of this argument is based on the false premise that for the purpose of determining compensation there is no “taking” until title passes, and that there is a distinction between a claim for *use* of the road and a claim for the value of appellees’ interest in the road. On the contrary, compensation for the use of property from the time possession is taken until the payment of the award takes the form of interest. *Commercial Station Post Office v. United States*, 48 F. 2d 183, 185 (C. C. A. 8, 1931). This is true whether the United States merely takes possession and leaves

the owner to his recourse under the Tucker Act, whether it takes possession in a condemnation proceeding, or whether it takes possession prior to instituting a condemnation proceeding. *Seaboard Air Line Ry. v. United States*, 261 U. S. 299 (1923); *Jacobs v. United States*, 290 U. S. 13 (1933); *United States v. Rogers*, 255 U. S. 163, 169 (1921); *Forbes v. United States*, 268 Fed. 273, 278 (C. C. A. 5, 1920); *11,000 Acres of Land, Etc. v. United States*, 152 F. 2d 566 (C. C. A. 5, 1945), certiorari denied 328 U. S. 835. The rule that date of "taking" for the purpose of determining value is the date of taking possession is a principle of substantive law under the Fifth Amendment of the Federal Constitution which controls in federal condemnation proceedings, rather than state law that market value is determined at the date of trial. *Comparet v. United States*, 164 F. 2d 452 (C. C. A. 10, 1947); *United States v. Johns*, 146 F. 2d 92 (C. C. A. 9, 1944). Hence, the provisions of the Oregon Constitution<sup>1</sup> and the decisions thereunder cited by appellees (Br. 14, 19) are irrelevant here. And, under the Federal Constitution the value of property taken is determined by reference to the market value at the date possession was taken.

Where the United States condemns and takes possession of land before ascertaining or paying compensation, the owner is not limited to the value of the property at the time of the

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<sup>1</sup> Like the constitutions of many other states, the Oregon Constitution requires that payment be made prior to the taking of possession. The Federal Constitution does not so limit the power of eminent domain. *Garrow v. United States*, 131 F. 2d 724, 726 (C. C. A. 5, 1942), certiorari denied, 318 U. S. 765.

taking; he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking. Interest at a proper rate is a good measure by which to ascertain the amount so to be added.

*Seaboard Air Line Ry. v. United States*, 261 U. S. 299, 306 (1923).

When that is done, just compensation has been paid and the condemnee is not entitled to recover, in addition, the value of the use of the property between the date of taking and the date of payment. Cf. *United States v. 6.87 Acres of Land, Etc.*, 147 F. 2d 351 (C. C. A. 2, 1945).

These principles were applied in the condemnation proceeding. The jury's verdict determined the value of the road "as of June 18, 1942" (R. 84), and the judgment awarded this sum "together with interest at the rate of six percent per annum from June 18, 1942, until paid." Thus, in the condemnation proceeding the market value of the entire road was determined as of the date possession was taken in 1942, and interest was allowed from that date until the date of payment. This constituted payment of just compensation as required by the Fifth Amendment, and appellees here are not entitled to anything more.

B. *Appellees were paid for their interest in the entire road by receipt of the amount of the judgment in the condemnation proceeding.*—In our main brief, pp. 10-16, we have demonstrated by reference to the stipulation of the parties, the verdict of the jury, and the judgment in the condemnation case that appellees recovered in that case the value of their entire interest

in the road, and not merely the value of the segment of the road over the Gossler land. Appellees rely upon Finding XIX, which states (R. 52):

Plaintiffs' claim presented herein for the reasonable and fair market value of the use by the Government of their road was not submitted, considered or fully decided in the condemnation action relating to the Gossler land.

Appellees contend in their brief (p. 16) that appellant is not in a position to challenge this finding, because the record in the Gossler condemnation action was not made a part of the record on this appeal. But the question is not one of fact at all. The United States is relying upon the judgment in the condemnation proceeding. The effect of that judgment is a question of law. As we have shown, *supra*, the finding was apparently based on the erroneous conclusion of law that the United States is obligated to pay both the value of property at the date of taking with interest and the value of the use of the property pending payment. Moreover, it is the judgment as entered to which the court must look in subsequent collateral proceedings to determine what it adjudges, and extrinsic evidence is not admissible to show that it differs from the judgment actually pronounced. *Freeman on Judgments* (5th ed.), sec. 767, p. 1626. Hence, the oral statement of the court in the condemnation case, upon which appellees rely (Br. 8 and 12), cannot alter the stipulation, verdict, and judgment in that case.

Furthermore, the Government designated "the complete record and all of the proceedings and evidence, including exhibits to the complaint, to be included in



the record on appeal'' (R. 63). The entire record in the Gossler condemnation case was not a part of the official record in the present case, and could not be designated as a part of the record on this appeal. The material portions of the record in the condemnation case were made a part of the record in this case, either in connection with the pre-trial order, or by being read into the record at the trial. Certainly, under these circumstances the burden was upon appellees to include in the record any other portion of the condemnation proceeding upon which they proposed to rely.<sup>2</sup> See page 12 of appellant's main brief. The position of the Government was made clear in the statement of points to be relied upon (R. 64-65). Appellees did not suggest that any additional portions of the condemnation record were necessary to decision of the question here presented. Indeed, even in their brief in this Court, while seeking affirmance on the ground that all of the condemnation record is not before this Court, they do not refer to any additional material which would tend to show that the condemnation award was limited to a small segment of the road nor do they assert that such material exists.

## II

**In any event, the trial court erred in rendering a judgment based on the cost of construction of the entire road, less the amount previously received for the use, as the reasonable and fair market value of the use of one-third of the road for hauling 66,643 cubic yards of sand and gravel**

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<sup>2</sup> The cases cited by appellees (Br. 12, 16) are not in point, since they all involved instances where the appellant designated less than the entire record of the case which was on appeal.



As the Government pointed out in its main brief, pp. 16-20, the award in this case represents not the value of the portion of the road on the Crown Zellerbach tract, but instead the value of the entire road less the amount of the verdict in the condemnation proceeding and other deductions. Appellees assert (Br. 21) that they are entitled to be compensated for the Government's use of the Crocker segment of the road, but that claim has never previously been made by them in this case. On the contrary, appellees' counsel stated at the trial of this case that in the condemnation action the court instructed the jury to find the value of appellees' interest in the Gossler and Crocker lands, not in the Crown Zellerbach land (R. 77). Again, in his final argument to the court below (R. 136) he made the statement that when they came to trial in the condemnation action the Government conceded that the measure of damages for the taking of the Gossler section of the road was the reasonable and fair market value of the whole road, "and we were willing to try the case on that basis, which meant that we were willing to waive the Tucker Act claim for the Crocker land because the Government obviously had title to that." And at page 138 of the record counsel stated: "The only thing which was litigated in the Gossler case was the value, as Judge Fee's instructions show, of the McNutt Brothers' and Gallagher's interest, insofar as the Crocker and Gossler lands are concerned, and nothing else."

The pre-trial order (R. 32-40), the findings of fact and the conclusions of law (R. 46-54) all show that

the recovery was strictly limited to the use of the Crown Zellerbach portion of the road. Indeed, in another portion of their brief, appellees say that they had a separate and distinct Tucker Act claim for the use of the segment of the road over the Crocker land and for the use of the segment of the road over the Crown Zellerbach land (Br. 18-19). Plainly, appellees may not assert a claim for the segment of the portion of the road over the Crocker land for the first time in this Court.

As we have pointed out in our main brief, the measure of compensation, if any, is the market value of the use of the road and not the cost thereof. Appellees seemingly argue that cost was simply one of the factors considered by the court (Br. 25) but this is not the case. The memorandum opinion of the court (R. 41) affirmatively shows that its award was based solely upon the cost of the road less certain deductions. The court there said (R. 41): "I think it is not inequitable for the plaintiff to recover his cost less sums and credits previously received." As we have pointed out in our main brief, the Fifth Amendment does not require a return of investment, but merely assures the payment of value of property taken. When it thus affirmatively appears that the court has used the wrong measure of compensation, its award must be set aside even if—which is not the case here—there is evidence which would otherwise support the award. *Iriarte, et al. v. United States*, 157 F. 2d 105 (C. C. A. 1, 1946).

## CONCLUSION

For the foregoing reasons, it is submitted that the judgment appealed from should be reversed.

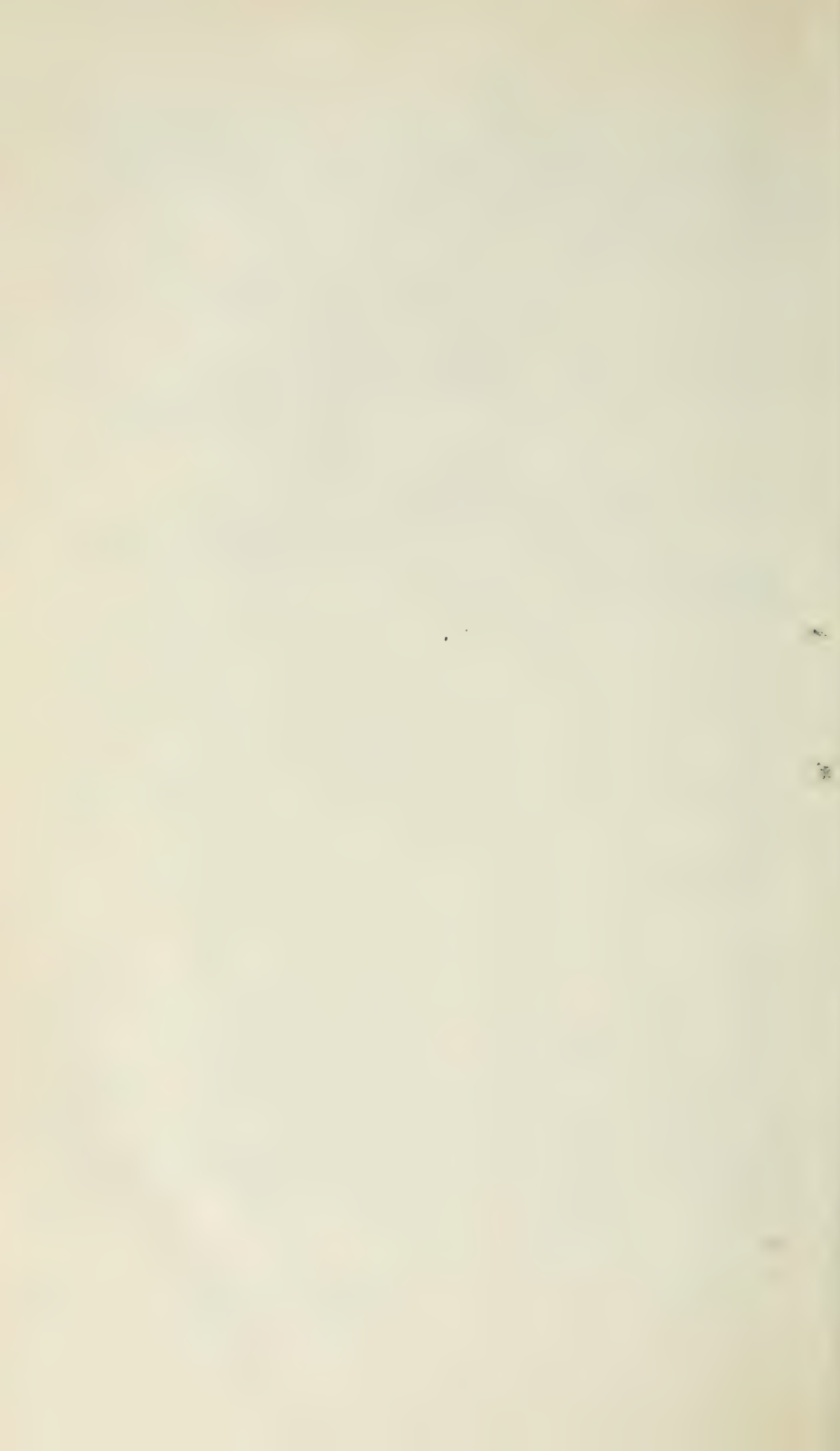
Respectfully,

A. DEVITT VANECH,  
*Assistant Attorney General.*

HENRY L. HESS,  
*United States Attorney,  
Portland, Oregon.*

ROGER P. MARQUIS,  
ELIZABETH DUDLEY,  
*Attorneys, Department of Justice,  
Washington, D. C.*

FEBRUARY 1948



11733  
No. 19480

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v.

J. H. GALLAGHER, J. IRA  
McNUTT, and Earl L. McNUTT,  
Appellees.

Appellant,

PETITION FOR REHEARING

Upon Appeal from the District Court of the  
United States for the District of Oregon

*Laurence T. Harris*

KOERNER, YOUNG, SWETT & MCCOLLOCH,

JAMES C. DEZENDORF,

800 Pacific Building,

Portland 4, Oregon,

Attorneys for Appellees.

FILED

APR 2 1948

PAUL P. O'BRIEN,  
CLERK





No. 10620

**In the United States  
Circuit Court of Appeals  
FOR THE NINTH CIRCUIT**

---

UNITED STATES OF  
AMERICA,

Appellant,

v.

J. H. GALLAGHER, J. IRA  
McNUTT, and Earl L. McNUTT,  
Appellees.

---

**PETITION FOR REHEARING**

---

Upon Appeal from the District Court of the  
United States for the District of Oregon

---

**To the Honorable Judges of the United States Circuit  
Court of Appeals, for the Ninth Circuit**

Come now Appellees and petition the court for a re-  
hearing herein for the reasons and upon the grounds as  
follows:

By its appeal the Government presented to the court for determination two questions, which are stated in this language in the Government's brief at Page 2:

### **"QUESTIONS PRESENTED**

"1. Whether the judgment rendered in a condemnation case in which the parties stipulated that the value of an entire road should be determined therein, and the jury returned a verdict for the value of the entire road, precludes the owners of the road from recovering in this action for the reasonable and fair market value of the use of a portion of the road.

"2. Whether the trial court erred in rendering a judgment based on the cost of construction of the entire road, less the amount previously received for its use, as the reasonable and fair market value of the use of one-third of the road, rather than basing it on the reasonable charge per cubic yard for such use."

The court in the opinion handed down on March 31 has resolved the first question in Appellees' favor by a correct application of the governing law to the facts of the case, saying:

"Since the condemnation proceeding sought title only, acquisition of the title after the services were

performed in no way affected the right to recover the chose in action against appellant for prior services.”

Our complaint has to do with the court’s disposition of the second question presented.

If we correctly understand the opinion, the case is remanded with directions to make an award upon a retrial not exceeding \$1,000.00 because that sum was fixed as the value of the title of the road in the prior condemnation action and is binding on the parties and establishes the limit of Appellees’ claim.

If the court’s holding in disposing of the first question is accepted as true, its holding with regard to the second question is erroneous. A direct, headon inconsistency exists which must be corrected.

Since the court holds in disposing of the first question presented that the claim herein asserted was not involved in the prior condemnation action and is for the Government’s use of the road prior to its acquisition of title, then the amount awarded in the prior condemnation action—whether it be one dollar or a million dollars—can have no possible relation to the award to be made in this action for the reasonable and fair market value of the Government’s use of the road prior to its acquisition of title.

In presenting the second question to be decided on this appeal, the Government did not claim that \$1,000.00 was the outside limit of Appellees' recovery but claimed that the court erred in applying an erroneous theory based on Appellees' cost of the road "*rather than basing its award on the reasonable charge per cubic yard for such use.*" (Government's brief Page 2)

There is competent evidence in the record to support an award of 10c per cubic yard, which would sustain an award of \$6,802.30. If the award had been made on that basis the Government could not have complained.

This court may not substitute its judgment upon a question of fact for that of the trial court nor may it establish a limit of \$1,000.00 on Appellees' recovery based upon a theory which it has already disproved in its opinion in disposing of the first question presented for determination.

Unless the original opinion is corrected, there will, of necessity, be a further appeal because on the retrial the trial court will either obey the mandate and reduce the award to below \$1,000.00—in which event Appellees will prosecute an appeal—or the trial court will recognize the inconsistency in the opinion and will apply the correct measure of compensation to Appellees' claim—in which event the Government will prosecute an appeal.



We therefore urgently request that on rehearing the court correct the original opinion by eliminating the \$1,000.00 limitation placed upon Appellees' claim since obviously the award in the prior condemnation action has no possible relation to Appellees' claim for the reasonable and fair market value of the Government's prior use of the road as the court correctly held in disposing of the first question presented for determination.

Respectfully submitted,

*Laurence T. Harris*

KOERNER, YOUNG, SWETT & McCOLLOCH

JAMES C. DEZENDORF,

*Attorneys for Appellees.*

I, JAMES C. DEZENDORF, one of counsel for Appellees, hereby certify that in my judgment the foregoing petition for rehearing is well founded and that it is not interposed for delay.

JAMES C. DEZENDORF.



No. 11735

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

---

In the Matter of

CHRIST'S CHURCH OF THE GOLDEN RULE,  
a nonprofit California corporation,

Bankrupt.

PAUL W. SAMPSELL, L. BOTELER and McINTYRE FARIES, as successor to Stewart McKee, the duly qualified and acting trustees in bankruptcy of the estate of Christ's Church of the Golden Rule, a nonprofit California corporation, bankrupt, and FRANK C. WELLER, THOMAS S. TOBIN and MARTIN GENDEL,

Appellants.

---


## TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States  
for the Southern District of California,  
Central Division

---

FILED

NOV 12 1947

PAUL P. O'BRIEN,   
CLERK



No. 11735

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

---

In the Matter of

CHRIST'S CHURCH OF THE GOLDEN RULE,  
a nonprofit California corporation,

Bankrupt.

PAUL W. SAMPSELL, L. BOTELER and McINTYRE FARIES, as successor to Stewart McKee, the duly qualified and acting trustees in bankruptcy of the estate of Christ's Church of the Golden Rule, a nonprofit California corporation, bankrupt, and FRANK C. WELLER, THOMAS S. TOBIN and MARTIN GENDEL,

Appellants.

---

**TRANSCRIPT OF RECORD**

Upon Appeal from the District Court of the United States  
for the Southern District of California,  
Central Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

For Appellants:

FRANK C. WELLER

THOMAS S. TOBIN

MARTIN GENDEL

607 James Oviatt Building

617 South Olive Street

Los Angeles 14, Calif. [1\*]

\*Page number appearing at foot of Certified Transcript.

2     *In the Matter of Christ's Church of the Golden*

In the District Court of the United States for the  
Southern District of California

Central Division

In Bankruptcy No. 44,128-WM

In the Matter of

CHRIST'S CHURCH OF THE GOLDEN RULE,  
a nonprofit California corporation,

Bankrupt.

SUPPLEMENT TO REFEREE'S CERTIFICATE  
ON PETITION FOR REVIEW OF ORDERS  
DENYING PETITION OF TRUSTEES FOR  
LEAVE TO EMPLOY CERTAIN COUNSEL

To the Honorable William C. Mathes, Judge of the above  
entitled Court:

I, Benno M. Brink, one of the Referees in Bankruptcy  
of this Court, before whom the above entitled matter is  
pending, do hereby supplement my Referee's Certificate  
on Petition for Review of Orders Denying Petition of  
Trustees for Leave to Employ Certain Counsel, filed by  
me in this matter on January 30, 1946, by transmitting  
herewith the following papers, to wit:

(a) Original letter addressed to me under date of May  
14, 1946, by Robert W. Kenny, Attorney General, by  
Gilbert F. Nelson, Deputy Attorney General, together  
with the papers described in Paragraphs 1, 2 and 3 of said  
letter.



(b) The following papers deposited with me by the said Gilbert F. Nelson on or about May 14, 1946:

Letter from Hotel Stratford dated December 29, 1945, and two blank forms of Proof of Unsecured Debt, to which are attached a notation "Obtained [2] from C. M. Rottmann 3-11-46-N A".

Envelope bearing the return card of Continental Building, Room 801—408 So. Spring Street, Los Angeles 13, California, and addressed to Graham, Reynolds Electric Company, 300 East Third Street, Los Angeles 13, California, which envelope contains two blank forms of Proof of Unsecured Debt.

Letter from Hotel Stratford dated December 29, 1945, to which is attached a notation "Calif. State Hotel Assn. rec Laura Ellis 3-12-46".

Letter from Hotel Stratford dated December 29, 1945, to which is attached a notation "Puro Filter Co 3-12-46- received from Mr. Wolf".

I hereby certify that none of the aforesaid papers was before me or considered by me at the time the orders affected by the aforesaid petition for review were made. I am transmitting the said papers for such consideration, if any, as should be accorded thereto in this matter.

Respectfully submitted this 24th day of May, 1946.

BENNO M. BRINK

Referee in Bankruptcy [3]

Robert W. Kenny  
Attorney General

STATE OF CALIFORNIA  
DEPARTMENT OF JUSTICE  
Los Angeles 12, California

May 14, 1946

Judge Benno M. Brink  
Referee in Bankruptcy  
323 Federal Building  
Los Angeles 12, California

Dear Judge Brink:

Re: In the Matter of Christ's Church of The  
Golden Rule, Bankrupt, No. 44128-WM

Enclosed herewith are certain papers taken from the trustee's files of the books and records of Christ's Church of The Golden Rule, bankrupt. These papers were turned over to us by Mr. Ridgeway of the office of the trustee Paul W. Sampsell. As you will note, each paper bears Mr. Ridgeway's initials.

On the 13th of May, Judge Mathes considered the review of your order disqualifying Craig & Weller as attorneys in the bankrupt estate. The above papers were called to Judge Mathes' attention at that time, and he instructed from the bench that these papers be presented to you for proper action in making them a part of the record in this case. The papers are particularly described as follows:

1. Charge Ticket for Wolcott's forms in the amount of \$15.38 under date of December 1, 1945, ordered

by Miss Grasome, one of the workers in the central office of the bankrupt corporation.

2. Copy of letter under date of December 28, 1945 instructing a check on Oregon creditors re filing of proof of unsecured debt through Los Angeles Board of Trade or Raphael Dechter.
3. List of certain accounts in duplicate with statement re three of the accounts, "a/c turned over to Board of Trade."

A copy of this letter is being sent to Mr. Sampsell for his file in this matter, and an extra copy for your file in event the original will be used in connection with forwarding these matters to the District Court in accordance with his instructions.

Very truly yours,

ROBERT W. KENNY

Attorney General

By Gilbert F. Nelson

Deputy Attorney General

GFN:B

CC: Mr. Sampsell [4]

P-36-B

American Laundry  
585 E. Empire St., San Jose  
Lee Rowland, Mgr.

O. L. King  
436 Clementina St.,  
San Francisco, Calif.

Referred to L. A. Office  
to contact  
Mr. J. A. Brittain, Th 3181  
6715 McKinley Ave., L. A. (1)

Patek & Co.  
1900 – 16th St.,  
San Francisco.

a/c turned over to  
Board of Trade

E. S. Browning Co.,  
1515 – 3th St.,  
San Francisco.

a/c turned over to  
Board of Trade

John P. Lynch Co. of S. F.  
1166 Howard St.,  
San Francisco.

a/c turned over to  
Board of Trade

S. L. Abbot Company  
135 King St.,  
San Francisco.

Granted ~~Power~~ of Attorney  
letter

Wyandotte Chemicals  
Corp.

Granted Letter of Attorney

J. B. Ford Division,  
Mr. S. P. Spencer  
870 Market St. (Flood  
Bldg.)  
San Francisco.

A. L. Hyde  
161 Ellis St.,  
San Francisco.  
26—ERR [5]

Not in – unable to contact.

*Ruie, a nonprofit California corporation, etc.* 7

214 South Spring Street  
Los Angeles 12, Calif.  
MIchigan 4943

Date 12/1/45  
Your No.  
Shipped Via taken  
Salesman  
Terms

Sold To  
Miss Grasome

CHARGE TICKET  
WOLCOTTS

Established 1893

✓	Amount	Form No.	Items	Remarks
	1M	1890	"Proof of unsecured debt & letter of attorney"	20 00
			Less 25%	5 00
				<hr/>
				15 00
			Tax	38
				<hr/>
				15 38

Paid Wolcott's HLA

Received Above Merchandise.....

25 ERR [6]

P-36-B  
American Laundry  
585 E. Empire St., San Jose  
Lee Rowland, Mgr.

O. L. King  
436 Clementina St.,  
San Francisco, Calif.

Referred to L. A. Office  
to contact  
Mr. J. A. Brittain, Th 3181  
6715 McKinley Ave., L. A. (1)



8     *In the Matter of Christ's Church of the Golden*

Patek & Co. 1900 - 16th St., San Francisco.	a/c turned over to Board of Trade
E. S. Browning Co., 1515 -- 3th St., San Francisco.	a/c turned over to Board of Trade
John P. Lynch Co. of S. F. 1166 Howard St., San Francisco.	a/c turned over to Board of Trade
S. L. Abbot Company 135 King St., San Francisco.	Granted <del>Power</del> of Attorney letter
Wyandotte Chemicals Corp. J. B. Ford Division, Mr. S. P. Spencer 870 Market St. (Flood Bldg.) San Francisco.	Granted Letter of Attorney
A. L. Hyde 161 Ellis St., San Francisco.	Not in - unable to contact.

[7]

Dec. 28, 1945

Please check with all of our Oregon creditors to see whether or not they have received a form of Proof of Unsecured Debt and Letter of Attorney and if same has been executed and forwarded to their chosen attorney.

It is our desire that each and every creditor be paid in full. In order that this may be accomplished it is necessary that claims be filed in the above legal manner.

P. S. Creditors are being represented by the Los Angeles Board of Trade and Raphael Dechter (if they do not have their own attorneys).

ERR [8]

Obtained From C. M. Rottman  
3-11-46- N W

(1)  
Federal 1244

HOTEL STRATFORD  
Eighth Street at Hoover  
Los Angeles  
5

December 29, 1945

Attention: Credit Department

Proof of unsecured debt in the Bankruptcy case of Christ's Church of The Golden Rule -Dba- Hotel Stratford must be filed within three months after December 4, 1945 with Referee Benno Brink, 323 Federal Building.

In order to participate in the election of Trustee for the Bankrupt claims must be filed by January 2, 1945 on which date election takes place in the courtroom of Benno Brink.

The Los Angeles Board of Trade, 704 So. Spring, Trinity 2614 and Rachael Dechter, 417 So. Hill, Trinity 8383 are prepared to handle claims in this matter for any creditors who wish to consult them.

hmb

HOTEL STRATFORD

Claim filed with Bd. Trade (1) [9]

10    *In the Matter of Christ's Church of the Golden*

In the District Court of the United States for the  
Southern District of California

Central Division

No. 44128 WM: In Bankruptcy

In the Matter of

CHRIST'S CHURCH OF THE GOLDEN RULE

a non-profit California Corporation

Bankrupt or Debtor

PROOF OF UNSECURED DEBT AND  
LETTER OF ATTORNEY

.....  
Claimant

At ....., in said.....District  
of....., on the.....day of.....,  
A. D., 19....., came....., of.....,  
in the County of....., and State of.....,  
in said District of....., and made oath  
and says:

If Individual Omit These Paragraphs  
Corporation

That deponent is.....treasurer  
of....., a corporation in-  
corporated by and under the laws of the State of  
.....and carrying on a business  
at....., County of.....,  
State of....., and that he is duly au-  
thorized to make this proof and execute the letter of  
attorney incorporated herein and has executed such letter  
of attorney on behalf of said corporation.

Partnership

Deponent is a member of the partnership firm of  
....., consisting of himself

and....., of.....,  
in the County of....., State of  
....., and is duly authorized to  
execute the letter of attorney incorporated herein, and  
has executed the same on behalf of said firm.

**Agent**

Deponent is the attorney (or authorized agent) of  
....., in the County of  
....., and State of  
..... This deposition can-  
not be made by said principal in person because.....  
.....  
.....

and deponent is duly authorized by his said principal to  
make this affidavit, and to execute the letter of attorney  
incorporated herein and has executed such letter of at-  
torney on behalf of said principal, and it is within his  
knowledge that the hereinafter mentioned debt was in-  
curred as and for the consideration hereinafter mentioned,  
and that such debt, to the best of his knowledge and  
belief, still remains unpaid and unsatisfied.

That the above named bankrupt Christ's Church of The  
Golden Rule, the person by or against whom a petition  
for adjudication of bankruptcy has been filed, was at and  
before the filing of said petition and still is justly and  
truly indebted to said claimant in the sum of \$.....,  
and the nature and consideration of said debt are as fol-  
lows: Labor, services, goods, wares and merchandise  
sold and delivered within two years last past by the  
claimant, an itemized bill of which, marked "Exhibit  
A" is hereto annexed, and referred to as a part hereof:

-----  
-----  
-----  
That no part of said debt has been paid, no note has been received for said indebtedness nor for any part thereof, nor has any judgment been rendered thereon, except as hereinabove stated; that there are no setoffs or counterclaims to the same; that the purchase price of said goods, wares and merchandise became due on the dates set out on said itemized bill; and that said claimant has not, nor has any other person by claimant's order, or to the knowledge or belief of deponent, or for claimant, had or received any manner of security whatsoever for said debt. Your claimant avers that every part of the obligation herein sought to be proved is free from usury as defined by the laws of the place where the said debt was contracted.

Said claimant hereby constitutes and appoints.....  
.....claimant's true and lawful attorney in fact to represent said claimant in said matter, with full authority to attend the meeting or meetings of creditors of the bankrupt aforesaid at a Court of Bankruptcy, wherever advertised or directed to be holden, on the day and at the hour appointed and notified by said Court in said matter, or at such other time and place as may be appointed by the Court for holding such meeting or meetings, or at which meeting or meetings, or any adjournment or adjournments thereof may be held, and then and there from time to time, and as often as there may be occasion for and in the name of the undersigned to vote for or against any proposal or resolution that may be then submitted under the Acts of Congress relating to bankruptcy; and in the choice of trustee or trustees



of the estate of said bankrupt, and for the undersigned to assent to such appointment of trustee, and with like powers to attend and vote in any other meeting or meetings of creditors, or sitting or sittings of the Court, which may be held therein for any of the purposes aforesaid; also to accept any composition proposed by said bankrupt in satisfaction of his debts, and to receive payment of dividends and of money due the undersigned under any composition, and for any other purpose whatsoever in the interest of the undersigned, with full power of substitution, and the undersigned does hereby revoke any and all prior powers of attorneys that may have been given by the undersigned.

(Personal signature here only)

-----  
Deponent

(Do not sign Firm or  
Corporate Name)

Claimant or as such officer, member, agent  
or attorney of Claimant.

Mail all Dividends and Notices to  
the following address:

-----  
-----  
Subscribed, sworn to and acknowledged before me  
this.....day of....., 19.....

(Place Notarial Seal Here)

-----  
Notary Public in and for the County  
of Los Angeles, State of  
California.

## DIRECTIONS

1. Notes and other writings received and copies of invoices must be attached. Mere statements are insufficient, itemized invoices are required.

2. If Claimant Is a Corporation:

- A. If there be a treasurer, he must sign the proof of debt and providing he is within the District where proof of debt is filed.
- B. If the corporation has no treasurer, the officer whose duties correspond most nearly to those of a treasurer must sign for the corporation following a statement to that effect.
- C. If the corporation has a treasurer who is not within the District, however, any officer or agent of the corporation with knowledge of the facts may sign in behalf of the corporation after making a statement to that effect.

3. If claimant is represented by attorney or agent. This proof of debt should not be made by attorney or authorized agent unless absolutely necessary, as sufficient reasons must be given why the proof was not made by the principal, in order to constitute a valid proof of debt.

4. General Directions:

- A. If the consideration is not labor or goods sold and delivered, the true consideration for the debt must be set forth in the blank space provided.
- B. Any exceptions as to payments, judgments, security setoffs or counterclaims with re-

spect to the debt must be set forth in the blank space provided above that statement.

- C. The signature at the bottom of the blank over the line marked "Deponent" must be that of the individual who makes the proof. No corporate, partnership, or principal's name must appear on that line, or the proof will be void.

No. 44128 WM

In the United States District Court  
Southern District of California

Central Division

In the Matter of

CHRIST'S CHURCH OF THE GOLDEN RULE

A non-profit California Corporation

Bankrupt.

PROOF OF DEBT DUE

.....  
For \$.....  
Allowed....., 194.....  
for \$.....

.....  
Referee in Bankruptcy.

.....  
Attorney for Claimant.

Wolcotts Form 1890 [11]

[The second Proof of Unsecured Debt and Letter of Attorney is not reproduced here; it is similar to that set forth on pages 10 to 15.]

[Canceled 3 Cent Stamp]

CONTINENTAL BUILDING

Room 801—408 So. Spring Street

Los Angeles 13, California

[Stamped]: Los Angeles Calif. Dec 28 6 PM 1945

GRAHAM, REYNOLDS ELECTRIC COMPANY

300 EAST THIRD STREET

LOS ANGELES 13, CALIFORNIA [14]

[The two Proofs of Unsecured Debt and Letter of Attorney enclosed in the foregoing envelope are not reproduced here for they are similar to that set forth on pages 10 to 15.]

Puro Filter Co.

3-12-46-

received from Mr. Waly

(6)

FEderal 1244

HOTEL STRATFORD

Eighth Street at Hoover

Los Angeles

5

[Written]: File claim owing prior to Dec. 4. After 12-9 bill Paul Sampsell Bd of Trade Bldg Recv & Trustee Christ Church of Golden Rule

December 29, 1945

Attention: Credit Department

Proof of unsecured debt in the Bankruptcy case of Christ's Church of the Golden Rule -Db- Hotel Stratford must be filed within three months after December 4, 1945 with Referee Benno Brink, 323 Federal Building.

In order to participate in the election of Trustee for the Bankrupt claims must be filed by January 2, 1945 on which date election takes place in the courtroom of Benno Brink.

The Los Angeles Board of Trade, 704 So. Spring, Trinity 2614 and Rachael Dechter, 417 So. Hill, Trinity 8383 are prepared to handle claims in this matter for any creditors who wish to consult them.

hmb

HOTEL STRATFORD

[Written]: No payt since 9/2/45 1/8/46 Complaint – loose faucet & stopped Stratford Hotel by G. C. Baumas letter acknowledging our property – new contract currently operated (6) [19]

Calif State Hotel Assn  
ac – Laura Ellis  
3-12-46

(5)

FEDERAL 1244

HOTEL STRATFORD  
Eighth Street at Hoover  
Los Angeles  
5

December 29, 1945

Attention: Credit Department

Proof of unsecured debt in the Bankruptcy case of Christ's Church of The Golden Rule –DbA– Hotel Stratford must be filed within three months after December 4, 1945 with Referee Benno Brink, 323 Federal Building.

In order to participate in the election of Trustee for the Bankrupt claims must be filed by January 2, 1945 on which date election takes place in the courtroom of Benno Brink.



The Los Angeles Board of Trade, 704 So. Spring, Trinity 2614 and *Rachel* Dechter, 417 So. Hill, Trinity 8393 are prepared to handle claims in this matter for any creditors who wish to consult them.

hmb

HOTEL STRATFORD

[Written]: 1 yrs r. – [illegible] – dated Feb. 27, 1940  
[illegible] Hayden Arrowsmith 6460 (5)

[Endorsed]: Filed May 24, 1946. [20]

---

[Title of District Court and Cause]

REFEREE'S CERTIFICATE ON PETITION FOR  
REVIEW OF ORDER UPON PETITION OF  
TRUSTEES FOR LEAVE TO EMPLOY CER-  
TAIN COUNSEL

To the Honorable William C. Mathes, Judge of the Above  
Entitled Court:

I, Benno M. Brink, one of the Referees in Bankruptcy of this Court, before whom the above entitled matter is pending, do hereby certify to the following:

Paul W. Sampsell, L. Boteler and Stewart McKee and Frank C. Weller, of Craig & Weller, Thomas S. Tobin and Martin Gendel have filed in this matter their petition for the review of an order made by your Referee in this proceeding on February 12, 1947, in which he denied the petition of the trustees in this case for leave to employ as their counsel the said Craig & Weller, with whom the said Thomas S. Tobin and Martin Gendel were to be associated.

The said Paul W. Sampsell, L. Boteler and Stewart McKee are the trustees in this matter and the said Frank C. Weller, Thomas S. Tobin and Martin Gendel are intervenors in the particular phase of this proceeding which is involved in this review. The said petition for review was signed on behalf of the said trustees by the [21] said Paul W. Sampsell alone and it was verified by him for and on behalf of his co-trustees. It is assumed that the said Paul W. Sampsell was duly authorized to act in the premises in accordance with the provisions of Section 47(b) of the Bankruptcy Act.

### The Proceedings

At the outset of the trusteeship in this matter, in January of 1946, the trustees presented their petition for leave to employ as their counsel two separate law offices, one, Craig & Weller, with whom Thomas S. Tobin and Martin Gendel would be associated, and the other, Irving M. Walker. Your Referee granted the said petition as to Mr. Walker and denied the same as to Craig & Weller and their said associates without prejudice, however, to the right of the trustees to employ other counsel of their own selection, in addition to Mr. Walker, subject only to the approval of the Court. Your Referee's order with respect to Craig & Weller and their said associates was confirmed on review, but on appeal to the Circuit Court of Appeals for the Ninth Circuit, it was reversed and the case was remanded for a hearing on the merits of the trustees' petition for the employment of Craig & Weller and their associates. (C. C. A. 9, 157 Fed. (2d) 910.)

Thereafter, on December 11, 1946, Paul W. Sampsell, one of the trustees, signed and filed a petition in which

it was stated that the trustees prayed for a hearing on their aforesaid petition. Hearings were thereupon had on December 16 and December 20, 1946, and on January 2, 1947. The said hearings having been concluded, your Referee, on February 12, 1947, signed and filed his findings of fact, conclusions of law and order, in which he again denied the said petition of the trustees for leave to employ Craig & Weller and their said associates, but without prejudice to the right of the trustees to employ other counsel of their own selection, in addition to Mr. Walker, subject only to the approval of this Court. It is the said order which is complained of on this review. [22]

### The Questions Presented

Section 39(c) of the Bankruptcy Act requires that a petition for review shall set forth "the order complained of and the alleged errors in respect thereto" and Section 39(a) 8 of said Act requires the Referee to include in his certificate on review "a statement of the questions presented".

The alleged errors in respect to your Referee's order are set forth in paragraph VI on pages 3 and 4 of the pending petition for review.

Subparagraph (a) of said paragraph VI presents this question:

Do your Referee's findings of fact sustain his conclusions of law and his order?

Subparagraph (b) of said paragraph VI presents this further question:

Is there any substantial evidence in this matter which would in any manner sustain your Referee's conclusions of law and order?

Subparagraph (c) of said paragraph VI presents the following questions:

(1) Is it a fundamental rule of law that "only in the rarest cases shall the petition for employment by trustees of counsel of their own choice be denied by a Referee in Bankruptcy"?

(2) Does your Referee's order violate the fundamental rules of law applicable to the situation which is here presented?

Subparagraph (d) of said paragraph VI presents a number of questions. Reference is made therein to "any alleged judicial discretion by the Referee". (Emphasis added.) This presents the following questions: [23]

(1) Could your Referee exercise judicial discretion in the matter here involved?

(2) If your Referee could exercise judicial discretion, was the order here in controversy a proper exercise of such discretion?

Said subparagraph (d) also states that "The Referee . . . having found that the solicitation by the bankrupt was not in conspiracy with or with the knowledge of the proposed counsel . . ." This presents the following question:

Is the said statement a correct recital of your Referee's findings of fact, particularly paragraph IX on pages 6 and 7 of said findings?

The said subparagraph (d) likewise states that "The Referee having found . . . that the solicitation by the bankrupt . . . was for the express purpose that the claims . . . would be voted for a trustee or trustees who would be impartial and impersonal and who would



not permit the administration of this estate to be influenced by the Attorney General of the State of California . . . .” This presents the following questions:

(1) Is the said statement a correct recital of your Referee’s findings of fact, particularly lines 15 and 16 on page 3, lines 4 to 7 inclusive and lines 20 to 26 inclusive on page 4, and lines 2 to 7 inclusive on page 5 of said findings.

(2) Was the solicitation of claims by the bankrupt corporation legitimate and proper in the light of your Referee’s findings of fact, particularly paragraphs I, II and III on pages 3 and 4, paragraph V on pages 4 and 5, paragraph VII on pages 5 and 6, paragraphs IX, X and XI on pages 6 and 7 and paragraph XIII on page 8 [24] of said findings.

### The Evidence

The evidence in this matter is contained in the following: (1) the trustee’s aforesaid petition for the employment of Craig & Weller and their associates, filed January 11, 1946; (2) your Referee’s order of January 22, 1946, denying said petition; (3) your Referee’s certificate on the review of said order filed January 30, 1946; (4) your Referee’s supplement to said certificate on review, filed May 24, 1946; and (5) the reporter’s transcripts of the hearings in this matter on December 16 and December 20, 1946, and on January 2, 1947.

All of said evidence is either going up with this certificate or is already in the files in this proceeding in the office of the Clerk of this Court.



Referee's Findings of Fact, Conclusions of Law  
and Order

The original of your Referee's findings of fact, conclusions of law and order in this matter is going up with this certificate.

Papers Submitted

For the information of the Court, I hand up the following papers:

1. Petition for Hearing Re: Trustees' Petition to Employ Counsel, filed December 11, 1946.
2. Notice of Continuance of Hearing on Trustee's Petition to Employ Counsel, filed December 17, 1946.
3. Notice of Continuance of Hearing on Trustees' Petition to Employ Counsel, filed December 23, 1947.
4. Findings of Fact, Conclusions of Law and Order Upon Petition of Trustees for Leave to Employ Certain Counsel, filed February 12, 1947.
5. Petition for Review of Referee's Order Denying Right of Trustees to Employ Counsel, February 19, 1947.
6. Reporter's transcript of hearings on December 16 and December 20, 1946. [25]
7. Reporter's transcript of hearing on January 2, 1947.

The following papers are on file in this proceeding in the office of the Clerk of this Court:

1. Voluntary petition in bankruptcy in this matter.
2. Order of adjudication and reference in this matter.

3. Referee's certificate on petition for review of orders denying petition of trustees for leave to employ certain counsel, filed January 30, 1946, to which are attached the trustees' petition for the employment of counsel, filed January 11, 1946, and your Referee's orders of January 14 and January 22, 1946, upon said petition.
4. Supplement to Referee's certificate on petition for review of orders denying petition of trustees for leave to employ certain counsel, filed May 24, 1946.

The remaining papers requested to be certified by the petitioner on review in this matter are purely formal and have no bearing on the questions here presented.

Respectfully submitted this 3rd day of March, 1947.

BENNO M. BRINK

Referee in Bankruptcy

[Endorsed]: Filed Mar. 3, 1947. [26]

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[Title of District Court and Cause]

PETITION FOR HEARING RE: TRUSTEES'  
PETITION TO EMPLOY COUNSEL

To the Honorable Benno M. Brink, Referee in Bankruptcy:

Come now your petitioners, Paul W. Sampsell, L. Boteler and Stewart McKee, and respectfully represent:

I.

That they are the duly elected, qualified and acting Trustees in the above entitled matter.

II.

That heretofore, they submitted a petition for the employment of Craig & Weller, Thomas S. Tobin and Martin Gendel as their permanent counsel in the within proceedings; that said petition was denied by this Court, by memoranda dated January 14th and January 22nd, 1946; that said order denying the employment of said counsel has been reversed by the Circuit Court of Appeals, and this Court was directed to hear the matter set forth in the petition in open court.

Wherefore, your petitioners pray that this Court set a date certain at which time your petitioners may again present, in open court, their original petition to employ Craig & Weller, [27] Thomas S. Tobin and Martin Gendel as the attorneys for your petitioners, acting in the within bankruptcy proceedings.

Dated this 10th day of December, 1946.

PAUL W. SAMPSELL

L. BOTELER and

STEWART McKEE

By Paul W. Sampsell

Trustees

It is ordered that this trustees' petition to employ counsel, hereinbefore mentioned, be and it hereby is, set for hearing before the undersigned Referee on December 16, 1946 at 2 P. M.

Dated December 11, 1946.

BENNO M. BRINK

Referee in Bankruptcy [28]

[Verified.]

[Endorsed]: Filed Dec. 11, 1946.

[Endorsed]: Filed Mar. 3, 1947. [29]

[Title of District Court and Cause]

NOTICE OF CONTINUANCE OF HEARING ON  
TRUSTEES' PETITION TO EMPLOY COUNSEL

To Paul W. Sampsell, Trustee in Bankruptcy, 111 West  
7th Street, Los Angeles, California;

To L. Boteler, Trustee in Bankruptcy, 704 S. Spring  
Street, Los Angeles, California;

To Stewart McKee, Trustee in Bankruptcy, 650 South  
Spring Street, Los Angeles, California:

You and Each of You Will Please Take Notice that  
the hearing on the Trustees' Petition to Employ Counsel  
in the above entitled matter has been continued from De-  
cember 16, 1946, to December 20, 1946, at 2 p. m. in the  
courtroom of Referee in Bankruptcy Benno M. Brink, 3rd  
Floor Federal Building, Temple and Spring Streets, Los  
Angeles, California.

Dated: December 17, 1946.

CRAIG & WELLER  
THOMAS S. TOBIN and  
MARTIN GENDEL

By Martin Gendel [30]

[Affidavit of Service by Mail.]

[Endorsed]: Filed December 17, 1946.

[Endorsed]: Filed Mar. 3, 1947. [31]

[Title of District Court and Cause]

NOTICE OF CONTINUANCE OF HEARING ON  
TRUSTEES' PETITION TO EMPLOY COUNSEL

To Paul W. Sampsell, Trustee in Bankruptcy, 111 W.  
7th St., Los Angeles, California;

To L. Boteler, Trustee in Bankruptcy, 704 S. Spring St.,  
Los Angeles, California;

To Stewart McKee, Trustee in Bankruptcy, 650 S. Spring  
St., Los Angeles, California:

You and Each of You Will Please Take Notice that  
the hearing on the Trustees' Petition to Employ Counsel  
in the above entitled matter has been continued from  
December 20, 1946, at 2 p. m., in the courtroom of  
Referee Benno M. Brink, 3rd Floor Federal Building,  
Temple and Spring Streets, Los Angeles, California to  
January 2, 1947, at the same time and place.

Dated January 20, 1946.

CRAIG & WELLER  
THOMAS S. TOBIN and  
MARTIN GENDEL  
By Martin Gendel [32]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Dec. 23, 1946.

[Endorsed]: Filed Mar. 3, 1947. [33]



[Title of District Court and Cause]

FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND ORDER UPON PETITION OF TRUS-  
TEES FOR LEAVE TO EMPLOY CERTAIN  
COUNSEL

On January 11, 1946, Paul W. Sampsell, L. Boteler and Stewart McKee, the trustees in this matter, filed herein their petition for leave to employ Messrs. Craig & Weller and their associates, Thomas S. Tobin and Martin Gendel, as their counsel and also to employ Irving M. Walker as such counsel.

On January 14, 1946, I authorized, by order, the employment of Mr. Walker but deferred formal action on the said petition as to Craig & Weller and their said associates until a later date. On January 22, 1946, I entered an order denying the said petition as to Craig & Weller and their said associates. •

Thereafter, the said trustees duly filed their petition for the review of the said orders of January 14 and January 22, 1946. On January 30, 1946, I filed my Referee's Certificate on review in the matter. At the subsequent hearing on review before the Honorable William C. Mathes, one of the Judges of this Court, Frank C. Weller, of the said firm of Craig & Weller, and the said Thomas [34] S. Tobin and Martin Gendel, with leave of Court, intervened in the matter. Thereafter, on May 13, 1946, the aforesaid order of January 22, 1946, was confirmed by the Judge and on May 24, 1946, I filed a supplement to my aforesaid certificate on review in this matter.

Later, on appeal by the said trustees and the said intervenors, the decision in question was reversed by the Cir-

cuit Court of Appeals and the case remanded for a hearing on the merits of the aforesaid petition of the trustees for the employment of Craig & Weller and their said associates (C. C. A. 9, 157 Fed. (2) 910).

Pursuant to the aforesaid decision on appeal, the trustees, on December 11, 1946, filed a petition for a hearing on their said petition for the employment of the said attorneys and, thereafter, hearings were had in the matter on December 16 and December 20, 1946, and on January 2, 1947.

Mr. Gendel, of the intervenors, participated in all of said hearings; Mr. Weller appeared at one or two of the hearings; Mr. Tobin appeared as a witness at one of the sessions; Mr. Boteler, one of the trustees, appeared at one of the hearings and the other trustees, Mr. Sampsell and Mr. McKee, did not personally participate.

At said hearings, the trustees and the intervenors were afforded an opportunity to be heard and to offer evidence on all the matters and things set forth or contained in the following: (1) the trustees' aforesaid petition for the employment of Craig & Weller and their associates; (2) the Referee's aforesaid order of January 22, 1946; (3) the Referee's aforesaid certificate on review; and (4) the Referee's aforesaid supplement to the certificate on review.

The said hearings were not adversary in character in that no one appeared to object to the employment of Craig & Weller and their associates by the trustees and no evidence was offered in opposition to that produced by or on behalf of the trustees and the intervenors. Consequently, the decision here made is based on the evidence received at the said hearings and on the matters and things [35] set forth or contained in the trustees' petition

for the employment of Craig & Weller and their associates, the Referee's order of January 22, 1946, and the aforesaid certificate on review and the supplement thereto.

The aforesaid hearings having been concluded and the matter having been submitted for decision, I now make the following findings of fact:

## FINDINGS OF FACT

### I.

I find that the bankrupt corporation was a far flung organization having assets said to be worth some three million dollars and owning and operating various and sundry enterprises in California and Oregon and having approximately eight hundred members or affiliates; that the corporation was organized by its president, Arthur L. Bell, and that it was completely dominated and controlled by him.

### II.

I find that on or about October 10, 1945, the Attorney General of the State of California filed an action in the Superior Court of the State of California against the bankrupt corporation, Mr. Bell and others, for an accounting and for the appointment of a receiver pendente lite; that the complaint in said action charged, among other things, that Bell had applied to his own use large sums of money belonging to the corporation, and that later, an amended complaint was filed praying not only for an accounting but also for the dissolution of the corporation.

### III.

I find that on or about October 11, 1945, a receiver was appointed in the aforesaid State Court Action; that

Bell was dissatisfied with said receiver and that on November 1, 1945, he caused this case to be commenced in this Court hoping to find here a more favorable atmosphere; that upon the filing of this case, the [36] Attorney General of the State of California objected to this Court's jurisdiction in the matter and that after certain proceedings were had, an order was entered herein on November 19, 1945, adjudging the said corporation a bankrupt; that thereupon Bell determined, if possible, to control the appointment of the trustee or trustees in this matter to the end that the administration of this estate would not be influenced by the said Attorney General.

#### IV.

I find that for many years the firm of Craig & Weller has represented the Los Angeles Wholesalers Board of Trade, a local mercantile adjustment bureau, in all bankruptcy matters; that claims secured by the Board in bankruptcy cases have invariably been voted by said firm; that Thomas S. Tobin, one of the intervenors, is on the staff of said firm and that Martin Gendel, another intervenor, has associated himself with said firm in this case; that while the said Board of Trade has undergone some sort of reorganization and is now known as the Los Angeles Credit Men's Association, it is still familiarly referred to in bankruptcy circles as the Board of Trade.

#### V.

I find that Bell was satisfied, from contacts and investigations which he had made, that if claims of creditors in this case were placed in the hands of the Board of Trade or in the hands of Raphael Dechter, a Los Angeles attorney, they would be voted for a trustee or trustees who would be impartial and impersonal and who would not



permit the administration of this estate to be influenced by the Attorney General of the State of California; that the particular Board of Trade which Bell had in mind was the aforesaid entity customarily represented by Craig & Weller and not any other entity with a similar name doing business in the City of Los Angeles; that Bell instructed the members and affiliates of the bankrupt corporation to contact all creditors in the case and to urge them to file their claims and to suggest to them that they place their claims [37] with the Board of Trade or with Raphael Dechter if they did not have attorneys of their own to represent them; that Bell's aforesaid determination to control the appointment of the trustee or trustees in this case was intensified by the fact that he learned that the Attorney General of the State of California was endeavoring to secure claims of creditors for voting purposes in the selection of the trustee or trustees in this matter.

## VI.

I find that it has not been shown that at the outset of this case the Board of Trade or Craig and Weller or their associates represented any creditors in this matter; I further find that after the commencement of this proceeding claims of creditors were solicited by or on behalf of the Board of Trade for voting purposes in the selection of the trustee or trustees in this case and that claims were likewise solicited by the Attorney General of the State of California for the same purpose.

I further find that as a result of the aforesaid solicitation, claims were secured by the Board of Trade and were subsequently voted by Craig & Weller and their associates in the selection of the trustees in this matter; I further find that Craig & Weller and their associates had actual



knowledge of the fact that claims in this case were being solicited for voting purposes by or on behalf of the Board of Trade.

## VII.

I find that at the first meeting of creditors in this case on December 4, 1945, claims secured by the Board of Trade were voted by Craig & Weller and their associates in the selection of trustees and that at the continued first meeting on January 2nd and January 3rd, 1946, claims secured by the Board of Trade were voted by Craig & Weller and their associates; that claims were also voted by Raphael Dechter, by the Attorney General and by others; that objection was made by the Attorney General to the claims voted by [38] Raphael Dechter upon the ground that the bankrupt had been instrumental in forwarding claims to him; that said objection was sustained and that the claims represented by Raphael Dechter were not allowed to be considered in the selection of the trustees; that it was not disclosed at the first meeting of creditors or at the continued first meeting that Bell had also instructed the members and affiliates of the bankrupt corporation to suggest to creditors that they place their claims with the Board of Trade; that that fact did not come to the attention of the Referee until after the trustees had been appointed and had qualified.

## VIII.

I find that at the continued first meeting of creditors on January 2nd and January 3rd, 1946, the creditors whose claims were allowed to be voted divided into two groups; that one group was represented exclusively by the Attorney General; that the other group included the creditors whose claims were voted by Craig & Weller and

their associates; that said last mentioned group was found to have the required majority of all claims which were allowed to be voted and was, therefore, entitled to select the trustees, subject to the approval of the Referee; that after certain proceedings were had, the said last mentioned group voted their claims for the said Paul W. Sampsell, L. Boteler and Stewart McKee and they were thereupon appointed as trustees in the case; that the said trustees could not have been elected without the claims which were secured by the Board of Trade and which were voted by Craig & Weller and their associates for the said trustees.

#### IX.

I find that Craig & Weller or their associates do not represent any interest adverse to the trustees or this estate; I find, however, that there was a connection between Craig & Weller and their associates on the one hand and the bankrupt corporation on the other, in that even if it was done without the knowledge of [39] the Board of Trade or of Craig & Weller or their associates, the members and affiliates of the bankrupt corporation did, in fact, follow the aforesaid instructions of Mr. Bell and did suggest to creditors in this case, either orally or in writing, that they place their claims with the said Board of Trade for voting purposes in the selection of the trustee or trustees in this case, and, at the same time, the claims of the said creditors were being solicited by or on behalf of the said Board of Trade for such voting purposes, of which fact Craig & Weller and their associates had actual knowledge.

#### X.

I find that it is a well recognized rule in bankruptcy that the bankrupt and his counsel should refrain from

participating directly or indirectly in the appointment of the trustee or the selection of his attorneys and I further find that it is extremely vital that this rule be followed in this case and that the attorneys for the trustees in this matter be entirely free from any connection, however remote, with the bankrupt or with Mr. Bell for the reason, among other things, that from the very commencement of this proceeding, the bankrupt has contended that, although in bankruptcy, it is a solvent entity and is entitled to be heard on all matters pertaining to the administration of the estate and the liquidation of its assets.

## XI.

I find that the trustees in this case are obligated, among other things, to thoroughly investigate the charge made in the aforesaid State Court Action that Mr. Bell applied to his own use large sums of money belonging to the bankrupt corporation, and that, if sufficient evidence is discovered, their attorneys must prosecute the matter with the utmost vigor against Mr. Bell; that, accordingly, it is absolutely indispensable that the attorneys for the trustees be entirely free from even the suggestion or suspicion of collusion with the bankrupt or with Mr. Bell. [40]

## XII.

I find that it has long been the custom in this district for a trustee in bankruptcy, everything being equal, to employ as his counsel the attorney who voted him into office; I further find that the reason for the selection by the trustees in this case of Craig & Weller and their associates as their counsel, in addition to Mr. Walker, is the fact that the trustees were elected by the claims voted in their behalf by Craig & Weller and their associates: I further find that experienced and qualified attorneys,

other than Craig & Weller and their associates, were and are available for employment by the trustees.

### XIII.

I find and I am satisfied that the employment by the trustees of Craig & Weller and their associates as their counsel would not be to the best interests of this estate for these reasons:

(1) That the employment by the trustees of Craig & Weller and their associates would leave this Court and this estate open to the charge, even if it were unwarranted, that the said attorneys were influenced in the discharge of their duties and responsibilities, to the advantage or benefit of the bankrupt corporation or its president and dominating personality, Mr. Bell, by something which occurred at the time of the appointment of the trustees in this case.

(2) That such charge, if made, even though it proved to be without foundation, would bring into question the fair and impartial administration of this estate and would cast a doubt upon the integrity of this Court. [41]

From the foregoing findings of fact, I arrive at the following conclusions of law:

### CONCLUSIONS OF LAW

I conclude that the petition of the trustees for leave to employ Craig & Weller and their associates, as their attorneys, should be denied, without prejudice, however, to the right of the said trustees to employ other counsel of their own selection, in addition to Mr. Walker, subject only to the approval of this Court.



Upon the foregoing findings of fact and conclusions of law, I now make the following order:

ORDER

It is ordered that the petition of Paul W. Sampsell, L. Boteler and Stewart McKee, the trustees in this matter, for leave to employ Messrs. Craig & Weller and their associates, Thomas S. Tobin and Martin Gendel, as their attorneys in this case, be and it hereby is denied, without prejudice, however, to the right of the said trustees to employ other counsel of their own selection, in addition to Irving M. Walker, subject only to the approval of this Court.

Dated: February 12, 1947.

BENNO M. BRINK,  
Referee in Bankruptcy.

[Endorsed]: Filed Feb. 12, 1947.

[Endorsed]: Filed Mar. 3, 1947. [42]

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[Title of District Court and Cause]

PETITION FOR REVIEW OF REFEREE'S ORDER  
DENYING RIGHT OF TRUSTEES TO EM-  
PLOY COUNSEL

To the Honorable Benno M. Brink, Referee in Bankruptcy:

Come now your petitioners, Paul W. Sampsell, L. Boteler, Stewart McKee, Frank C. Weller of Craig & Weller, Thomas S. Tobin and Martin Gendel, and respectfully represent as follows:

I.

That Paul W. Sampsell, L. Boteler and Stewart McKee are the duly elected, qualified and acting trustees in



the within bankruptcy proceedings; that on December 20, 1946, this Court reaffirmed the order of Hon. Wm. C. Mathes, Judge of the District Court, dated February 7, 1946, whereby Frank C. Weller, of Craig & Weller, Thomas S. Tobin and Martin Gendel were determined to be parties to the within proceedings.

## II.

That on January 11, 1946, Paul W. Sampsell, L. Boteler and Stewart McKee, your petitioners, as trustees in bankruptcy in the above entitled matter, filed a petition with the Referee in charge of this proceedings, Honorable Benno M. Brink, for employment of counsel consisting of Frank C. Weller of Craig & Weller, with whom would be associated Thomas S. Tobin and Martin Gendel and Irving M. [43] Walker, all of Los Angeles, California, to act as attorneys for your petitioners as trustees in the within bankruptcy.

That said petition was accompanied by the affidavit of Frank C. Weller, Thomas S. Tobin, Martin Gendel and Irving M. Walker, stating under oath that they, nor none of them are, or ever have been employed by, or connected with the bankrupt or debtor, or with any other person having an interest adverse to the receivers, trustees, or the creditors, and that they, nor none of them are in any way, either directly or indirectly, under obligation of any kind or description to the debtor, nor have any interest adverse to the trustees herein.

## III.

That after the filing of said Petition for Employment of Counsel, which counsel were the unanimous selection of your petitioners as trustees in bankruptcy herein, Honorable Benno M. Brink, Referee in Bankruptcy in charge of this proceeding, on January 14, 1946, rejected the petition

of your trustees in so far as Messrs. Craig & Weller, Thomas S. Tobin and Martin Gendel were concerned, and made and entered an order denying the trustees' petition to employ Craig & Weller and their associates, and reserving jurisdiction to make a further order in connection with the application of said trustees.

#### IV.

That thereafter, on January 22, 1946, the Referee made a second order supplementing his order of January 14, 1946, and expanding the same, but nevertheless denying your petitioners' petition to employ Messrs. Craig & Weller and their associates as counsel for the trustees herein.

#### V.

That the trustees named herein duly filed their petition for the review of the said orders of January 14, 1946, and January 22, 1946, and the said orders were affirmed before the said Honorable Wm. C. Mathes, Judge of the within District Court; thereafter, the trustees and their proposed counsel, as appellants in intervention, duly appealed and the matter was heard and reversed by the United States Circuit Court of Appeals, for the Ninth Circuit, and the case was remanded to this court for a judicial hearing on the merits of the original petition of the trustees for the appointment of Frank C. Weller of [44] Craig & Weller, Thomas S. Tobin and Martin Gendel. (C. C. A. 9th, 157 Fed. (2) 910); that pursuant to the aforesaid decision on appeal before the United States Circuit Court of Appeals, the trustees, petitioners herein, on December 11, 1946, filed a petition for a judicial hearing of their original petition for the employment of the said attorneys, and intervening petitioners herein, and thereafter hearings were held before this court on December 16, 1946, December 20, 1946, and on January 2, 1947.

That after the consideration of written and oral testimony the Referee herein did, on the 12th day of February, 1947, sign findings of fact and conclusions of law, and pursuant thereto the following order was entered on the 12th day of February, 1947:

"It is ordered that the petition of Paul W. Sampsell, L. Boteler and Stewart McKee, the trustees in this matter, for leave to employ Messrs. Craig & Weller and their associates, Thomas S. Tobin and Martin Gendel, as their attorneys in this case, be and it hereby is denied, without prejudice, however, to the right of the said trustees to employ other counsel of their own selection, in addition to Irving M. Walker, subject only to the approval of this Court."

## VI.

That the aforesaid order of February 12, 1947, is erroneous for the following reasons:

(a) The findings of fact do not sustain the conclusions of law and the aforesaid order;

(b) No substantial evidence was introduced at the time of the hearing nor was found as a finding of fact which would in any manner sustain the conclusions of law and the order of the Referee;

(c) The aforesaid order violates the fundamental rules of law as reiterated by the United States Circuit Court of Appeals, for the Ninth Circuit, in the prior appeal on this matter to the effect that [45] only in the rarest cases shall the petition for employment by trustees of counsel of their own choice be denied by a Referee in Bankruptcy;

(d) The Referee having found that the proposed counsel had no interest adverse to the within estate,

having found that the solicitation by the bankrupt was not in conspiracy with or with the knowledge of the proposed counsel and that the solicitation was for the express purpose that the claims “. . . would be voted for a trustee or trustees who would be impartial and impersonal and who would not permit the administration of this estate to be influenced by the Attorney General of the State of California . . .”, these findings did not justify the exercise of any alleged judicial discretion by the Referee permitting the denial of the petition for employment as filed by the trustees, petitioners herein.

## VII.

In connection with the within petition for review your petitioners request that the following documents be certified to the District Judge.

1. Voluntary Petition in Bankruptcy;
2. Order of Adjudication and Reference;
3. Order of January 3, 1946, appointing Paul W. Sampsell, L. Boteler and Stewart McKee as trustees;
4. Order approving bond of trustees;
5. Trustee's petition for employment of counsel Craig & Weller, Thomas S. Tobin, Martin Gendel and Irving M. Walker, together with the affidavits of proposed counsel attached thereto and filed January 11, 1946;
6. Orders dated January 14, 1946, and January 22, 1946, denying trustee's petition to appoint Craig & Weller [46] and their associates as attorneys for the trustees;



7. Petition of your trustees for a hearing on their original petition for the employment of the aforesaid attorneys, dated December 11, 1946;

8. Findings of Fact, conclusions of law and order of the Referee, dated February 12, 1947, denying the petition of trustees to employ the named counsel therein which trustees' petition was filed January 11, 1946, and for the hearing of which petition the further petition was filed by the trustees on December 11, 1946.

Wherefore, your petitioners pray for a review of said order of February 12, 1947, by the Judge of the District Court, and that said order be reversed and that the petition of Paul W. Sampsell, L. Boteler and Stewart McKee for leave to employ Frank C. Weller of Craig & Weller, and their associates, Thomas S. Tobin and Martin Gendel, in addition to Irving M. Walker, as their attorneys in this case, be approved and granted.

PAUL W. SAMPSELL  
L. BOTELER &  
STEWART MCKEE

By Paul W. Sampsell

Trustees in Bankruptcy, appearing in propria persona

CRAIG & WELLER &  
FRANK C. WELLER

By Frank C. Weller

Thomas S. Tobin

Martin Gendel [47]

[Verified.]

[Endorsed]: Filed Feb. 19, 1947.

[Endorsed]: Filed Mar. 3, 1947. [48]



[Title of District Court and Cause]

NOTICE OF HEARING OF PETITION ON RE-  
VIEW BY TRUSTEES, ET AL., RE: EM-  
PLOYMENT OF COUNSEL

To Paul W. Sampsell, Stewart McKee, L. Boteler, Craig  
& Weller, Thomas S. Tobin and Martin Gendel:

You and Each of You will Please Take Notice that  
the hearing on the Petition filed by you for review of  
the order of February 12, 1947, of Referee Brink, deny-  
ing the right of the Trustees to employ certain counsel  
will be heard before the Hon. William D. Mathes, in his  
courtroom on the 2nd floor of the Federal Building, Los  
Angeles, California, said hearing to be held on the 24th  
day of March, 1947, at the hour of 10 o'clock a. m., or  
as soon thereafter as counsel can be heard.

Dated this 10th day of March, 1947.

MARTIN GENDEL

Of Counsel for Petitioners

[Endorsed]: Filed Mar. 10, 1947. [49]

In the District Court of the United States  
Southern District of California  
Central Division

In Bankruptcy No. 44,128-WM

In the Matter of

CHRIST'S CHURCH OF THE GOLDEN RULE,  
a non-profit California corporation,

Bankrupt.

ORDER OF JUDGE ON PETITION FOR REVIEW  
OF REFEREE'S ORDER OF FEBRUARY 12,  
1947

Upon the petition for review of the trustees filed February 19, 1947; and upon the certificate of Referee Benno M. Brink filed March 3, 1947; and upon the proceedings had before the Referee as appears from his certificate; and upon hearing the interveners Frank C. Weller, Thomas S. Tobin and Martin Gendel, appearing by Martin Gendel, Esquire, the petitioners not appearing, and no one appearing as adversary to the petition for review;

It Is Ordered that the order of the Referee dated February 12, 1947, denying the ex parte petition of the trustees for leave to employ Frank C. Weller, Thomas S. Tobin and Martin Gendel as counsel for the trustees be and is hereby reversed and set aside, and that the Referee's findings of fact and conclusions of law on said petition be and are hereby vacated and set aside; and the matter is hereby recommitted [50] to the Referee with directions

(1) to hold further hearing on the petition of the trustees filed January 11, 1946, for leave to employ Frank C. Weller [Craig & Weller], Thomas S. Tobin and Martin Gendel as counsel;

(2) to hear all competent, relevant and material evidence which, after due notice of the time and place fixed for the hearing, may be adduced at such hearing in support of or in opposition to said ex parte petition of the trustees for leave to employ certain counsel [cf. Appeal of Sampsell, et al., 157 F. (2d) 910, 911 (C. C. A. 9th, 1946)];

(3) From all the evidence adduced, including matters judicially noticed, to make written findings of fact and conclusions of law specifying, among other things,

(a) whether the trustees, and each of them, now ask that their petition filed January 11, 1946, for leave to employ Frank C. Weller [Craig & Weller], Thomas S. Tobin and Martin Gendel as counsel be granted;

(b) whether the verified petition of the trustees seeking leave to employ the interveners Frank C. Weller, Thomas S. Tobin and Martin Gendel states "the reasons for [their] selection," as required by General Order 44 [11 U. S. C. foll. § 53, p. 109];

(c) whether the trustees, or any of them, directly or indirectly in any way or manner, agreed or arranged to employ Frank C. Weller and Thomas S. Tobin and Martin Gendel, or any of them, as counsel for one or more of the trustees prior to the final voting of the creditors' claims represented by the interveners, or one or more of them, upon the [51] election of trustees;

(d) whether one of the reasons for the selection of the interveners, or any one or more of them, as counsel is the fact that the interveners represented creditors' claims aggregating a majority in number

and amount, and voted such claims at the election of trustees in favor of the petitioners, or any of them;

(e) whether any of the creditors who are represented by the interveners in this proceeding had ever been represented by the interveners, or any of them, prior to the date of filing of the original petition herein on November 1, 1945;

(f) whether the bankrupt is the alter ego of Arthur L. Bell;

(g) whether the bankrupt or Arthur L. Bell, or any of the attorneys for either of them, directly or indirectly in any way or manner, solicited any creditor to appoint the interveners, or any of them, as attorney for such creditor in this bankruptcy proceeding, and if so, state the names of such creditors, the nature and amount and date of verification and date of filing of their claims, and in what manner the appointment of the interveners, or any of them, to represent such creditor was brought about;

(h) whether the interveners and each of them have, since the commencement of these proceedings, had no "connection whatsoever with the bankrupt" as alleged in the petition of the trustees, and if that allegation be untrue, what the facts are on the subject; [52]

(i) whether at the time of filing of the "Trustees' Petition for Authority to Employ Counsel," dated January 11, 1946, the interveners, and each of them, "were not under any obligation whatsoever to said bankrupt" as alleged in the petition of the trustees, and if that allegation be untrue, what the facts are on the subject;



(j) whether the trustees' petition states "all of the . . . connections [of Frank C. Weller, Thomas S. Tobin and Martin Gendel, and each of them] with the bankrupt . . . the creditors . . . and their respective attorneys," as required by General Order 44, and if not, what the facts are on the subject;

(k) whether since the commencement of these proceedings on November 1, 1945, any "connections", within the meaning of General Order 44, have existed between the interveners Frank C. Weller, Thomas S. Tobin and Martin Gendel, or any of them, and any of the attorneys for the bankrupt, or "the creditors or any other party in interest," and if so, what the facts are on the subject;

(l) whether the interests of each of the creditors represented by the interveners, or any of them, in this proceeding "are identical with those of your petitioners [the trustees]" as alleged in the petition of the trustees, and if that allegation be untrue, what the facts are on the subject;

(m) whether the representation by the interveners, or one or more of them, of "a number of unsecured creditors" would or might constitute a representation of any interest adverse to the [53] trustees or the estate within the meaning of General Order 44, and if so, what the facts are on the subject;

(n) whether the bankrupt or any of its attorneys, or any other person, furnished the interveners, or any of them, or any client of the interveners, or any of them, with a list of all or part of the creditors of the bankrupt [see exhibit in file: Letter of Board



of Trade of San Francisco, dated December 26, 1945], and if so, what the facts are on the subject;

(o) whether the interveners, or any of them, or any client of the interveners, or any of them, advanced expenses for the solicitation of claims or purchased claims to be represented by the interveners, or any of them, and if so, what the facts are on the subject;

(p) whether, if any client of any of the interveners has advanced funds for the benefit of said attorneys, there is any agreement or arrangement to reimburse such client, directly or indirectly in any way or manner, out of fees or expenses which might be allowed the interveners if appointed counsel for the trustees herein or otherwise, and if so, what the facts are on the subject;

(q) whether, if the bankrupt solicited or caused to be solicited claims voted by the interveners or any of them, such solicitation was done upon the understanding or arrangement, directly or indirectly in any way or manner, that such claims would be voted for trustees who would act favorably toward the bankrupt and Arthur L. Bell and the [54] attorneys for the bankrupt and Arthur L. Bell, or any of them, and if so, what the facts are on the subject;

(r) whether, if the bankrupt solicited or caused to be solicited claims voted by the interveners, or any of them, such solicitation was known to the interveners, or any of them, prior to the voting of such claims for the election of trustees herein, and if so, what the facts are on the subject;

(s) whether the attorneys for the bankrupt, or any of them, did participate directly or indirectly in any way or manner, in the appointment of the trustees or in the selection of attorneys for the trustees, and if so, what the facts are on the subject;

(t) what is the "something which occurred at the time of the appointment of the trustees in this case" to which the Referee refers at page 8, lines 23-24 [Par. XIII (1) of the findings of fact dated February 12, 1947;

(u) if any of the facts found are not based upon evidence adduced at hearings on the petition, but are judicially noticed, state the facts of which judicial notice is taken and the source of judicial knowledge of each such fact [cf. *National Fire Ins. Co. v. Thompson*, 281 U. S. 331, 336 (1930); *Freshman v. Atkins*, 269 U. S. 121, 124 (1925); *McLeod v. Boone*, 91 F. (2d) 71 (C. C. A. 9th, 1937)]; and

(4) enter an appropriate order predicated upon such findings of fact and conclusions of law; and [55]

It Is Further Ordered that the Clerk this day forward copies of this order by United States mail to

- (1) Referee Benno M. Brink;
- (2) The attorneys for the Trustees; and
- (3) The Interveners.

July 11, 1947.

WM. C. MATHES

United States District Judge

Judgment entered Jul. 11, 1947. Docketed Jul. 11, 1947. Book 11, page 20. Edmund L. Smith, Clerk; by Theodore Hocke, Deputy.

[Endorsed]: Filed Jul. 11, 1947. [56]

[Title of District Court and Cause]

NOTICE OF APPEAL

To the Honorable Wm. C. Mathes, Judge of the Above  
Entitled Court;

To the Honorable Benno M. Brink, Referee in Bank-  
ruptcy of the Above Entitled Court; and,

To Edmund L. Smith, Esq., Clerk of Said Court:

You and Each of You Will Please Take Notice, and  
Notice Is Hereby Given, that Paul W. Sampsell, L.  
Boteler, and McIntyre Faries, as successor to Stewart  
McKee, the duly qualified and acting trustees in bank-  
ruptcy in the above named bankruptcy proceeding, and  
Frank C. Weller, Thomas S. Tobin, and Martin Gendel,  
duly authorized interveners, and each of them, hereby  
appeal to the United States Circuit Court of Appeals  
for the Ninth Circuit, from that order, final judgment  
and decree entitled "Order of Judge on Petition for Re-  
view of Referee's Order of February 12, 1947" filed,  
docketed and entered in the above entitled matter on the  
11th day of July, 1947.

Dated: August 18th, 1947.

FRANK C. WELLER  
THOMAS S. TOBIN  
MARTIN GENDEL

By Martin Gendel  
Attorneys for Appellants

[Endorsed]: Filed Aug. 19, 1947. [57]

[Title of District Court and Cause]

APPELLANTS' STATEMENT OF POINTS ON  
APPEAL

To the Honorable the United States Circuit Court of  
Appeals for the Ninth Circuit, and to the Above En-  
titled Court:

Come now the appellants Paul W. Sampsell, L. Boteler and McIntyre Faries as successor to Stewart McKee, the duly qualified and acting trustees in bankruptcy in the above named bankruptcy proceeding, and Frank C. Weller, Thomas S. Tobin and Martin Gendel, duly authorized interveners in said proceedings, and state that the points on which they intend to rely on the appeal in this proceeding are as follows:

1. The "Order of the Judge on Petition for Review of Referee's Order" for leave to employ certain counsel, is erroneous in that there were no facts before the Referee or the District Judge which would in anywise justify the exercise of any possible judicial discretion to deny to the trustees in the within bankruptcy proceeding the right to employ qualified counsel of their own choice, where employment of counsel by said trustees was proper.

2. Said order is erroneous in that a referee in bankruptcy has no right to refuse to authorize trustees in bankruptcy to employ qualified counsel of their own choice when employment by said trustees is otherwise proper, unless facts, recognizable at a judicial hearing [58] showing grave disqualifications of such counsel, and limited



only to the rarest cases, are presented to the referee and are properly findings of fact in support of such an order.

3. That the order of the District Judge from which the within review is taken is erroneous for the reason that the matters involved before the District Judge and the Referee unreasonably delay the expressed desire of the trustees in the instant bankruptcy case to employ and use the counsel of their original choice, as reflected by their petition of January 11, 1946, rather than to continue to be compelled to use interim counsel; admittedly the administration of the instant case, from its inception, has required active and vigorous participation by the attorneys for the trustees; in view of the fact that considerable delay had been incurred by the present appellants being required to take the first appeal in this matter to this Honorable Court, and that further delay had been incurred by reason of the necessity for the hearing occasioned by the order of this Honorable Court (Appeal of Sampsell et al., C. C. A. 9th, 1946 (157 Fed. 2d 910)) in reversing the original orders of the Referee and District Judge in this matter, it would appear that said District Judge could have conducted such judicial deliberations in the form of hearing further evidence if he deemed it necessary to enlarge upon the findings of fact as theretofore submitted to him by the Referee in Bankruptcy, rather than to re-refer the matters of inquiry to the Referee. It is the position of the appellants, predicated upon the evidence and the findings of fact submitted by the Referee in Bankruptcy in support of his order of February 12, 1947, that the sole judicial discretion exercisable by the District Judge was, and is, to grant the petition for review by appellants, and to reverse the order of the Referee. [59]



4. That the order of the District Judge of July 11, 1947, was erroneous for the reason that it failed to contain therein findings of fact and conclusions of law supporting the position of the District Judge in refusing to grant the petition on review of the trustees and reversing the order of the Referee dated February 12, 1947.

5. That the order of the District Judge dated July 11, 1947, was erroneous in that it not only disregarded the law of the case binding the aforesaid District Court and the Referee in Bankruptcy arising by virtue of the judgment of this Court made and entered in the appeal of Sampsell et al. (C. C. A. 9th, 1946), 157 Fed. (2d) 910, but, also, that as to all pertinent inquiries which could concern the order made by the Referee on February 12, 1947, the aforesaid District Judge had before him all of the evidence and the findings of fact of the said Referee, which evidence and findings of fact unequivocally demonstrated that this was not a case in which the Referee could exercise his judicial discretion and deny the appointment of counsel as requested by the trustees in their original petition filed January 11, 1946; that the aforesaid order of the District Judge dated July 11, 1947, is erroneous for the reason that the 21 items to which the said court directs the attention of the Referee in Bankruptcy under sub-division 3 of said order are either covered in the evidence and findings of fact as submitted to the aforesaid District Judge, or are not matters which are properly to be considered by the Referee or District Judge in considering the original petition for leave to employ counsel as filed by the trustees in this proceeding. As an example of the statement of this point on appeal, your appellants respectfully direct the attention of this court to [60] item No. 3-a contained in the order of the

District Judge; in answer to this inquiry of the District Judge, the aforesaid Judge had before him a written and verified petition for hearing signed by the trustees in bankruptcy requesting the Referee to grant their original petition of January 11, 1946, and filed with the Referee after this Honorable Court had reversed the order of May 10, 1946, made and entered by this District Judge; in addition thereto the District Judge had before him the petition for review, likewise verified by the trustees in bankruptcy; how can the District Judge with propriety inquire as to whether or not the trustees ask that their petition filed January 11, 1946, be granted?

In subdivision 3-b the District Judge questions whether or not the verified petition of the trustees qualifies with the requirements of General Order 44, and this inquiry is made directly in the face of the judgment of this Court entered in the appeal of Sampsell et al. (C. C. A. 9th, 1946), 157 Fed. (2d) 910, wherein this Honorable Court stated as follows:

“. . . Every requirement of General Order 44 is fully satisfied by the allegations of the petition. . . .”

As a further example of the errors of the District Judge, we find, in paragraph “f” of subdivision 3, that the District Judge desires the Referee to make a finding as to whether or not the bankrupt is the alter ego of Arthur L. Bell. In view of the fact that the appellants have not challenged the finding of the Referee to the effect that Arthur L. Bell controlled and directed the bankrupt corporation, how [61] can we possibly be concerned with a collateral determination of a matter which might take many weeks of evidence to determine?

6. Said order is erroneous in that it deprives the trustees in bankruptcy of the right to select counsel of their own choice and it deprives the appellants in intervention of the right to follow their profession, all without due process of law, because of the lower Courts' undue and unjustifiable delay in the determination of the original petition for leave to employ counsel by the trustee.

Dated: August 18, 1947.

FRANK C. WELLER  
THOMAS S. TOBIN  
MARTIN GENDEL

By Martin Gendel  
Attorneys for Appellants

[Endorsed]: Filed Aug. 19, 1947. [62]

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[Title of District Court and Cause]

CONCISE STATEMENT OF POINTS ON APPEAL  
AND DESIGNATION OF RECORD NECES-  
SARY FOR CONSIDERATION THEREOF AND  
TO BE PRINTED

To the Honorable William C. Mathes, Judge of the Above  
Entitled Court:

For their concise statement of points on appeal on which the appellants intend to rely, the appellants, and each of them, adopt the statement of points filed with the Clerk of the District Court of the United States, Southern District of California, Central Division.

The appellants do hereby designate and adopt the statement of points as their assignments of errors.

1. The appellants do hereby designate the original transcript of record in case No. 11370 in the United States Circuit Court of Appeals, for the Ninth Circuit, in the matter of Christ's Church of the Golden Rule, a non-profit California corporation, involving the appeal of Paul W. Sampsell, et al., as part of the within record, by reference, and not to be reprinted, pursuant to the order of said Circuit Court of Appeals made August 22, 1947, in this appeal. [63]

\* \* \* \* \*

Dated: Aug. 26, 1947.

FRANK C. WELLER,  
THOMAS S. TOBIN and  
MARTIN GENDEL,

By Martin Gendel,  
Attorneys for Appellants

[Endorsed]: Filed Aug. 26, 1947. [65]

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[Title of District Court and Cause]

PETITION AND ORDER RE: USE OF ORIGINAL  
TRANSCRIPTS

To the Hon. Wm. C. Mathes, Judge of the District Court:  
Comes now your petitioner Martin Gendel, and respectfully represents as follows:

I.

That he is one of the appellants, and likewise, one of counsel for appellants in the within proceedings on appeal from the order of this court entered on July 11, 1947



II.

That as a part of the record designated to be presented before the 9th Circuit Court of Appeals, appellants have designated two volumes of transcript of testimony taken before Hon. Benno M. Brink, Referee in Bankruptcy, and bearing dates of December 16, 1946, December 20, 1946 and January 2, 1947, said testimony having been transcribed by the court reporter; the original of which transcripts are now on file with the Clerk of this court; that appellants are desirous of having the aforesaid original transcripts forwarded to the Ninth Circuit Court of Appeals in order that the record may be printed therefrom rather than submit to the clerk of the court [66] the sole copies of the transcript which are now in the possession of your appellants since it is necessary for your appellants to use the aforesaid copies in preparing the briefs on appeal.

Therefore, your petitioner prays that this court make an order directing the Clerk of this Court to forward the original transcripts designated above to the 9th Circuit Court of *Appeal* to be used for printing the record, rather than to forward copies thereof.

Dated this 11th day of September, 1947.

MARTIN GENDEL,  
Petitioner.

It Is So Ordered:  
September 11th, 1947.

PAUL J. McCORMICK,  
Judge of the District Court.

[Verified.]

[Endorsed]: Filed Sept. 11, 1947. [67]



[Title of District Court and Cause]

# CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 68 inclusive contain full, true and correct copies of Supplement to Referee's Certificate on Petition for Review of Orders Denying Petition of Trustees for Leave to Employ Certain Counsel with the documents annexed thereto; Referee's Certificate on Petition for Review of Order Upon Petition of Trustees for Leave to Employ Certain Counsel; Petition for Hearing re Trustees' Petition to Employ Counsel; Notice of Continuance of Hearing on Trustees' Petition to Employ Counsel filed Dec. 17, 1946; Notice of Continuance of Hearing on Trustees' Petition to Employ Counsel filed Dec. 23, 1946; Findings of Fact, Conclusions of Law and Order Upon Petition of Trustees for Leave to Employ Certain Counsel; Petition for Review of Referee's Order Denying Right of Trustees to Employ Counsel; Notice of Hearing of Petition on Review by Trustees et al re Employment of Counsel; Order of Judge on Petition for Review of Referee's Order of February 12, 1947; Notice of Appeal; Appellants' Statement of Points on Appeal; Designation of Record and Petition and Order re Use of Original Transcripts which, together with the Transcript of Record in case No. 11370 in the United States Circuit Court of Appeals for the Ninth Circuit and Original Reporter's

Transcript of Hearings on December 16 and 20, 1946 and January 2, 1947, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$16.55 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 22 day of September, A. D. 1947.

EDMUND L. SMITH,

Clerk

By Theodore Hocke,

Chief Deputy Clerk

[Title of District Court and Cause]

Before Hon. Benno M. Brink, Referee in Bankruptcy.

HEARING ON PETITION TO EMPLOY COUNSEL

Appearances:

For the Petitioners: Martin Gendel, Esq., and Frank M. Chichester, Esq., 607 James Oviatt Building, 617 South Olive Street, Los Angeles, California. TRinity 2346.

Frank C. Weller, Esq., and Thomas S. Tobin, Esq., by Frank C. Weller, Esq., Room 817, 111 West 7th Street, Los Angeles, California. TRinity 5531.

Los Angeles, California, Monday, December 16, 1946,  
2:00 p. m.

The Referee: Christ's Church of the Golden Rule.

Mr. Gendel: Ready for the Petitioners, your Honor.

The Referee: This is the further hearing on the Petition to Employ Counsel, which is the Petition that was filed January 11, 1946. All right, let the record show the attendance of whoever may be here—Mr. Gendel, Mr. Weller, Mr. Chichester.

Are the Trustees going to appear?

Mr. Hunt: Your Honor, I just came by; just happened to be in the building.

Mr. Gendel: Mr. Hunt is a spectator.

The Referee: Have the Trustees had notice of this hearing, does any one know?

Mr. Gendel: Your Honor, the Trustees are in this position, as I understand it from talking to them: Mr. Sampsell is up North working on some matters in connection with Christ's Church of the Golden Rule. I just

spoke a few minutes before court time to Mr. Boteler. As your Honor knows, it was switched over to yourself to determine whether or not his presence would be necessary, our position being that they had presented a written, verified Petition for Employment, and that that was their prima facie case, and that that is what they intended to submit to the Court. [3\*] Unless there were something to contradict the allegations in the Petition, it is their position as well as ours that the Petition is in the form required under General Order in Bankruptcy No. 44 and provisions of the Federal Bankruptcy Act applicable thereto, and that, in accordance with the authorities that apply, unless, as is indicated by the leading case, in the rarest of instances there is some judicial or legal ground of disqualification, the Petition is to be granted. Now if your Honor desires the personal presence of a Trustee or Trustees to support that position—

The Referee (Interrupting): Where is the decision of the Ninth Circuit? Does anybody have it?

Mr. Gendel: I have a copy of it, your Honor.

The Referee: Let me see it, please.

(Mr. Gendel hands a paper to the Court.)

Mr. Gendel: You will note that there is an inked indication there of a correction of a citation. That was given to me by the Clerk of the Circuit Court. He had inadvertently cited the case of *In Re Rury* when they meant *Kanter versus Robertson*.

The Referee: Well, the Circuit Court of Appeals of the Ninth Circuit, in the case of *Christ's Church of the Golden Rule*, in a proceeding in which Mr. Sampsell and Mr. Boteler and Mr. McKee, as Trustees in Bankruptcy

of Christ's Church of the Golden Rule, and Frank C. Weller, Thomas S. Tobin, and Martin Gendel were appellants on November 15, 1946, [4] reversed an Order made by Judge Mathes and remanded the case for a hearing on the merits of the Petition for Employment of Attorneys.

(Reading)

"This is an appeal from an order of the district court in the above bankruptcy proceeding confirming the denial by the referee of the petition of the above trustees for the employment of certain persons as their attorneys. The ground of the appeal is the claim that, without hearing on the petition, which satisfied all the requirements of General Order in Bankruptcy No. 44, the referee denied the employment of the attorneys by the trustees.

"We think the court and referee erred in proceeding *ex parte* and in not having a hearing on the petition. General Order 44 provides

"'No attorney for a receiver, trustee or debtor in possession shall be appointed except upon the order of the court, which shall be granted only upon the verified petition of the receiver, trustee or debtor in possession, stating the name of the counsel whom he wishes to employ, the reasons for his selection, the professional services he is to render, the necessity for employing counsel at all, and to the best of [5] the petitioner's knowledge all of the attorney's connection with the bankrupt or debtor, the creditors or any other party in interest, and their respective attorneys. If satisfied that the attorney represents no interest adverse to the receiver, the trustee, or the estate in



the matters upon which he is to be engaged, and that his employment would be to the best interests of the estate, the court may authorize his employment, and such employment shall be for specific purposes unless the court is satisfied that the case is one justifying a general retainer . . . ' (Emphasis supplied.)

"An inspection of the trustees' verified petition shows that it stated the complicated character of the trustees' anticipated litigation, creating a special need of counsel for the successful discharge of the trustee obligation. Every requirement of General Order 44 is fully satisfied by the allegations of the petition. As was stated by the Second Circuit with reference to General Order 44 In the Matter of Mandel, 69 Federal 2d, 830,

"'Only in the rarest cases should the trustee be deprived of the privilege of selecting his own counsel, and the reasons which make it for [6] the best interest of the estate to have the court select the attorney over the trustee's objections should appear in the record.'"

Of course that case is not applicable, gentlemen, as you will note in that case the Court selected the attorney over the Referee's objections.

(Reading)

"The Fourth Circuit in *Kanter versus Robertson*, 102 Federal (2d) 92, 93, stated of the relations between the trustee and his attorney

"'. . . Ordinarily the choice of an attorney for the Trustee rests with the Trustee subject to the approval or disapproval of the referee or judge, and

the choice of the trustee should be confirmed unless good reasons appear to the contrary.'

"The reasons of the referee 'to the contrary' were arrived at by an ex parte process of which the trustees had no knowledge until the order was entered. Thus the referee frustrated the first choice of the trustees for their attorneys for the important and difficult work before them.

"The referee frankly says he makes no findings of fact on the allegations of the petition because the proceeding is ex parte. He states he was in receipt of certain communications which raised a [7] question in his mind as to whether the proposed attorneys might have an interest which would disqualify them. We think that under General Order 44 the petitioning trustees are entitled to a hearing on their petition for a judicial deliberation on the matters the referee has in mind.

"The trustees ask us to pass on the sufficiency of the matters outlined but not found in the referee's report to warrant a refusal to permit the employment of the proposed attorneys. This would be futile for we do not know what importance they may have as the issue is developed at the hearing.

"The order appealed from is reversed and the case remanded for a hearing on the merits of the petition for the employment of the attorneys."

Gentlemen, the Trustees have asked the Circuit Court to rule that they are entitled to a hearing; and, upon the Petition filed by the Trustees the Referee now has set this date for a hearing. You gentlemen may proceed.

Now let the record show that Mr. L. Boteler, one of the Trustees, has now entered the court room. Mr. Sampsell and Mr. McKee, the other two Trustees, are not here.

Now, so that there may be no question about the record, the Court will require some kind of a statement from Mr. Sampsell and Mr. McKee that they had notice about this [8] hearing so that there will not be any question but what they had an opportunity to be heard.

Mr. Gendel: I do not know what your Honor is driving at in reference to their knowledge or notice. Mr. Sampsell signed this Petition, if I understand correctly, after talking to Mr. McKee and Mr. Boteler. Mr. Boteler is here; and as I have indicated, Mr. Sampsell is up North on this estate's business. I have not talked to Mr. McKee.

The Referee: But I want to make sure that both Mr. Sampsell and Mr. McKee knew of this hearing on this day so that there may be no question but what they were given an opportunity to be heard. That is the gist of the thing, gentlemen. The gist of the matter is that the Trustees, and now the Interveners, should have been given the opportunity to be heard upon their Petition.

Mr. Gendel: Of course, to be frank with you, your Honor, I do not take that view at all. I believe the authorities are very clear—and I do not want to argue them, I think they have been argued sufficiently in this matter—as indicating that a verified Petition complying with all the requirements of law is the prima facie requirement and evidence. If the Referee then feels that there is any reason possibly to deny that prima facie showing, then the Referee can not do it Star Chamber or ex parte or otherwise but must set the matter down for hearing. And at that time, just as would be the case in

any matter of disqualification, [9] the available evidence, if any, would have to be submitted to contradict the Petition. At this time, therefore, I would like to make an offer of proof that the Trustees, if called to testify, and the Interveners, if called to testify, would testify under oath in accordance with the written, verified Petitions and acknowledge affidavit that your Honor now has, being the basis for the original application for the employment of certain named counsel, to wit, Frank C. Weller, of Craig & Weller; Thomas S. Tobin; and Martin Gendel.

The Referee: You have no adversary, Mr. Gendel. The Court is not an adversary. Let us keep that clear.

Mr. Gendel: We seem to have had one. It was quite effective, has been for eleven months. We have not acted as counsel. If the Court feels that he needs the assistance of any one to present any evidence or anything of that character, of course we want to cooperate with the Court. But the showing, in our estimation, springs from the verified and sworn matters which your Honor now has before you. There is nothing more we can do except to get up and reiterate what is a matter of sworn record.

The Referee: You gentlemen are here in compliance with the ruling of the Circuit Court of Appeals,—

Mr. Gendel (Interrupting): Yes.

The Referee (Continuing): —which says you are entitled to a hearing. You may proceed. [10]

Mr. Gendel: We are asking now that your Honor accept the offer of proof; and that is that the Trustees and Interveners, as named, would testify in accordance with the original verified Petition and the sworn Affidavit of non-disqualification.



The Referee: You are stating that if each of the Trustees was called he would testify under oath to the matters set forth in the Trustees' Petition regarding the employment of counsel?

Mr. Gendel: That is right.

Mr. Boteler, will you take the stand, please?

All that Mr. Boteler will testify to, your Honor, is that both Mr. McKee and Mr. Sampsell, as well as himself, had knowledge and notice of the date of this hearing and it was their understanding that if any one appeared Mr. Boteler would be sufficient to testify for the group.

The Referee: He does not need to testify under oath. The only thing I want to be sure about, gentlemen, is that all of the Trustees have had notice of the fact that this was the time set for the hearing requested by the Trustees and Interveners.

Mr. Boteler: I know that Mr. Sampsell and I did, because we discussed the matter. I assume that Mr. McKee did.

The Referee: You do not know, though, do you?

Mr. Boteler: I only know it by hearsay, that he was told. But I do not know who told him. I did not. [11]

Mr. Gendel: I understood from Mr. Sampsell that he had talked the matter over with Mr. McKee and Mr. Boteler, and that he felt that the importance of his business up North on behalf of the estate was such that his presence was more urgently required there than here, where he could add nothing more to the Petition than was already on file. I can only tell your Honor about it. I know Mr. Sampsell and Mr. Boteler knew about it. I do not know how important it is that Mr. McKee be present.



I suppose we could obtain for your Honor, if that is necessary, an acknowledgment that he had notice of the date of the hearing.

The Referee: I think that would be sufficient.

Mr. Gendel: We shall be glad to obtain that for you.

The Referee: All right. Is there anything else about which you wish to examine Mr. Boteler?

Mr. Gendel: No, your Honor. That was the purpose.

The Referee: Mr. Boteler, a statement is made in the decision of Judge Denman of the Ninth Circuit to this effect: He first refers to a decision in the case of Kanter versus Robertson, 102 Federal (2d), 92, which decision said: (Reading)

“‘. . . Ordinarily the choice of an attorney for the Trustee rests with the Trustee subject to the approval or disapproval of the referee or judge, and the choice of the trustee should be confirmed unless good reasons appear to the contrary.’”

The Judge Denman goes on to say: (Reading) [12]

“The reasons of the referee ‘to the contrary’ were arrived at by an ex parte process of which the trustees had no knowledge until the order was entered. Thus the referee frustrated the first choice of the trustees for their attorneys for the important and difficult work before them.”

Now you were one of the Trustees at the time that this Petition was presented last January; is that the fact, Mr. Boteler?

Mr. Boteler: Yes, sir.

The Referee: Do you have any recollection at all of the circumstances surrounding the selection of counsel by the Trustees?

Mr. Gendel: Your Honor, might I perhaps clarify the record to show what I believe your Honor desires it to show: That your Honor, after the Trustees had indicated to the Court whom they desired to employ, then indicated to the Trustees that you would not approve such a selection; that, in spite of that indication, the formal Petition, which is now before the Court, and the Affidavits were then presented to your Honor? That particular language of Judge Denman was his voluntary language; and the only thing that was urged before the Appellate Court, as appears in the record, was the fact that there was no court hearing; that the ruling made by your Honor was in chambers, without the presentation of any evidence. [13]

The Referee: I understand you, then, Mr. Gendel, as stating that before the Referee entered the Order of January 2nd—

Mr. Gendel (Interrupting): The last one was January 22nd, your Honor.

The Referee: January 22, 1944, yes.

Then do I understand you, Mr. Gendel, to state that before the Referee entered the order of January 22, 1944, in which he denied the Petition of the Trustees for leave to employ Craig & Weller, Thomas S. Tobin, and Martin Gendel, and even before in a previous order, in which the Referee granted the Trustees' Petition to employ Irving Walker and held their Petition as to Craig & Weller and Martin Gendel and Thomas S. Tobin under future submission, the Referee informed the Trustees of his anxieties on this particular question and told the Trustees that he was concerned about certain phases of the case and that he would not authorize the employment of Craig & Weller and Martin Gendel and Thomas S. Tobin—are you now saying that that is the fact?

Mr. Gendel: Yes, I do not think there is any question about it. Where the Circuit Court got its information I do not know.

The Referee: Are you also saying that before the Order was made Mr. Weller personally interviewed the Referee on the question? [14]

Mr. Weller: Yes.

Mr. Gendel: We will so stipulate.

The Referee: Then you say there is no basis for Judge Denman's statement that the reasons of the Referee "to the contrary" were arrived at by an ex-parte process of which the Trustees had no knowledge until the Order was entered?

Mr. Gendel: I think that the unfair language of Judge Denman was that the Trustees had no knowledge, because it is obvious that they knew what your Honor was thinking from the time that your Honor apparently started thinking of it.

The Referee: Well, do you say there is no basis in the record for that statement by Judge Denman?

Mr. Gendel: As to the ex-parte, I believe that arrangement was ex parte. There was no court hearing. But as to the Trustees' having knowledge of what was in your Honor's mind at all times, there is no basis for that statement at all. Where he got that information I still do not know. However, I do not know that that affects the issue at all. I am glad to clarify the record if there is any question about it.

The Referee: Well, Mr. Boteler, do you want to present anything at all in support of your Petition to employ Craig & Weller and Martin Gendel and Thomas S. Tobin?

Mr. Gendel: Your Honor, you mean other than the verified Petitions we have now accepted as his testimony?

The Referee: Yes, other than what is in the Petitions? [15]

Mr. Boteler: I think not, sir; not that I know of.

The Referee: What is the purpose of the hearing you want? You told the Ninth Circuit that this Order was not proper because you did not have a hearing. What do you want to bring out in the hearing? All the matters that have been brought out thus far were before the Referee at the time he made the Order.

Mr. Gendel: Your Honor, I think—

The Referee (Interrupting): I am addressing myself to Mr. Boteler. He is here without counsel.

Mr. Boteler: Well, I just stood here trying to recall; and I recall the situation as Mr. Gendel has outlined it, that we knew about what was in the Referee's mind before the Referee made this Order. I do not remember too clearly when it was first discussed or how many times it was discussed; but I am quite sure that that is true. Now in response to your question, if the Court please, as to what is the purpose of this hearing—and I assume you ask that question because I state I have nothing further to present to the Court with respect to this Petition—

The Referee: Yes.

Mr. Boteler (Continuing): —I do not know except in a general way. As the Court knows, I am not an attorney myself; and I understand that this hearing results from an Order by Judge Denman that it be heard by you.

The Referee: That is right. Judge Denman sustained [16] your position, Mr. Boteler, that before denying your



Petition for leave to employ these gentlemen the Referee should have had a hearing. That is what he says:

"The order appealed from is reversed and the case remanded for a hearing on the merits of the petition for the employment of the attorneys."

Mr. Boteler: If this hearing is for the purpose of taking testimony as to whether or not the Trustees knew anything about how you felt until after you made your Order, it seems to me the hearing is to no purpose, because we know that—

The Referee (Interrupting): No, that apparently was not the reason for the hearing. Just what I am to hear I do not know. He says "the hearing on the merits of the petition."

Mr. Boteler: Well, if your Honor please, if you do not know, I do not know, I am sure.

The Referee: In any event, you have nothing to present?

Mr. Boteler: No, sir.

The Referee: And, Mr. Gendel, the Interveners have nothing further to present?

Mr. Gendel: You mean other than our sworn affidavit, your Honor?

The Referee: Yes.

Mr. Gendel: Not unless your Honor would care to have Mr. Weller and me testify in response to any questions. We [17] shall be glad to do that if there is anything further that is not covered in the Affidavit.

The Referee: I am not an adverse party.

Mr. Gendel: I do not know whether we have made ourselves clear or not. As far as we are concerned, we



feel that the opinion of the Circuit Court of Appeals justifies the position which we have taken throughout these proceedings; and that is that a verified Petition for the Trustees, accompanied by a sworn Affidavit which complies with General Order 44 and the requirements of the Bankruptcy Act and the applicable authorities is a prima facie case. From there on, your Honor, we seek to pass the ball to those who would disqualify us.

(The Clerk enters.)

The Referee (To the Clerk): Let me have the Bankruptcy Act, please.

(The Clerk leaves.)

Well, I think at that point I should insert in the record an official statement of the fact that at no time has anybody attempted to disqualify either Mr. Gendel or Mr. Weller or Mr. Tobin; to make it clear that the Referee was never asked by anybody to disqualify any of you gentlemen.

(The Clerk enters, hands papers to the Court, leaves.)

Well, let us see what General Order 44 says. The Trustees' Petition which is before the Court here alleges [18] that they are the Trustees; that it is necessary to have counsel employed under a general retainer for the purpose set forth in the Petition; that they propose (reading)

" . . . upon the granting of this Petition to employ Messrs. Craig & Weller with whom will be associated Thomas S. Tobin and Martin Gendel, also to employ Irving M. Walker of Los Angeles, California, who are specialists in bankruptcy matters, as such counsel, and they have agreed to accept as compensation for any services rendered to your petitioners as Trustees,

such amount as may be allowed therefor by this Court to them as attorneys for the Trustees."

Then there is the further allegation that the interests, properties, and enterprises of the bankrupt are very extensive, and so forth, and so forth.

Then there is the following allegations: (Reading)

"That to the best of your petitioners' knowledge, said attorneys, and particularly, Craig & Weller, Thomas S. Tobin and Martin Gendel, represent a number of unsecured creditors of the above estate whose claims were filed and allowed at the first meeting of creditors herein, and whose interests are identical with those of your petitioners, and that said attorneys, or none of them, have any connection whatsoever with the bankrupt or debtor, [19] nor has said bankrupt or debtor any connection with them, or any of them, nor are the attorneys, or any of them, under any obligation whatsoever to said bankrupt or debtor."

I shall suspend this discussion for a moment to call to your attention, gentlemen, that we are honored by the presence in the court room of the Honorable Estes Snedecor, a Referee in Bankruptcy of Portland, Oregon.

We are glad to have you, Mr. Snedecor. Will you be more comfortable there, or would you care to come up and sit behind the bench? The bench was made too small really to take care of a man of your dimensions, physically or mentally.

Mr. Snedecor: I am very comfortable here, thank you.

The Referee: We are particularly glad to have Referee Snedecor here because, as you know, very valuable assets

of this estate are located in Referee Snedecor's jurisdiction and he has already had contact with the case.

The interesting point we are trying to decide here, Referee Snedecor, is whether or not the present attorneys, Grainger & Hunt, with whom you have had some contact, should be replaced with other attorneys, namely Messrs. Craig & Weller, Thomas S. Tobin, and Martin Gendel. So it is appropriate that you are here, because you may see these gentlemen later on. You will have an opportunity now to size them up when you are not on the bench. [20]

To resume our consideration of the present matter, I shall read your allegation No. VII:

"That your petitioners are satisfied from the Affidavit of the attorneys proposed by your petitioners attached hereto that said attorneys, or none of them, represent any interest adverse to your petitions as Trustees, or any creditor, in matters upon which said attorneys are to be engaged, and that the employment of said attorneys under a general retainer would be for the best interest of this estate.

"Wherefore, your petitioners pray that an Order issue appointing Messrs. Craig & Weller and Irving M. Walker and their associates as attorneys for your petitioners as Trustees in Bankruptcy herein."

Well, now, Mr. Boteler, before the Order which was reversed by the Circuit Court of Appeals was made, you were informed, were you not, that the Referee had received in his office a letter, a copy of a letter, apparently sent out by the Hotel Stratford, one of the entities of Christ's Church of the Golden Rule? That letter said,

among other things, it being addressed to a creditor of Christ's Church of the Golden Rule: (Reading)

"The Los Angeles Board of Trade, 704 So. Spring, Trinity 2614 and Rachael (sic) Dechter, 417 So. Hill, Trinity 8383 are prepared to handle claims in this [21] matter for any creditor who wish to consult them."

And I think the Referee said to you gentlemen at the time this letter was discussed that there was a possibility that, because of this reference to the Board of Trade, some one might say there was collusion between Craig & Weller, attorneys for the Board of Trade, and the attorneys for the Bankrupt Corporation. Did I say anything along that line?

Mr. Boteler: I recall some such discussion and some such language.

The Referee: All right, Mr. Boteler, before you signed the Petition which was later filed in this Court for the employment of Messrs. Craig & Weller and Mr. Gendel and Mr. Tobin, did you make any investigation at all about the situation?

Mr. Boteler: With particular reference to that letter?

The Referee: Yes, did you make any investigation to satisfy yourself as to why the Hotel Stratford made any reference at all to the Board of Trade, as to how they found out about the Board of Trade? Did you make any such investigation?

Mr. Boteler: If it can be called such, I think I did this: To begin with, isn't that the letter that referred to a Board of Trade located in a building at 704 South Spring Street?



The Referee: That is right. [22]

Mr. Boteler: That building happens to be the building in which I have my own office. I think I checked the telephone directory and then after further discussion or checking it was apparent that in referring to the Board of Trade it referred to what was known as the Retailers Board of Trade that happened to office in that building at that time.

The Referee: Yes. Well, did you go to the Hotel Stratford and try to find the person that sent this letter?

Mr. Boteler: No, sir.

The Referee: Did you try to find out why the person that wrote this letter referred to the Board of Trade?

Mr. Boteler: I made no such inquiry.

The Referee: Do you know whether your brother Trustees made any inquiry along that line?

Mr. Boteler: Sir?

The Referee: Do you know whether your brother Trustees made any inquiry along that line?

Mr. Boteler: At that time I don't recall that they did or that they said they did or that any one else said they did.

The Referee: Well, you said under oath, and your fellow Trustees said under oath, that to the best of your knowledge, Craig & Weller, Thomas S. Tobin, and Martin Gendel had no connection with the Bankrupt. Now you knew of course that Craig & Weller for many years had been attorneys for the Board of Trade? [23]

Mr. Boteler: Yes.

The Referee: You knew that?

Mr. Boteler: Yes.



The Referee: And if the Board of Trade had had any contact with the Stratford Hotel with reference to this bankruptcy, that would be a connection, would it not? But you made no investigation to find out whether anything had transpired or not?

Mr. Boteler: No. I made no independent investigation along that line.

The Referee: Well, gentlemen, suppose we go over the Order which the Referee made here and see whether or not you gentlemen wish to offer any evidence on any of the matters set forth in this Order.

The Order states, among other things, on page 2 thereof: (Reading)

"(1) That the employment by the trustees of Craig & Weller and their associates would leave this court and this estate open to the charge, however unwarranted it might be, that the said attorneys were influenced in the discharge of their duties and responsibilities, to the advantage or benefit of the bankrupt [24] corporation or its president and dominating personality, Mr. Arthur L. Bell, by something which occurred at the time of the appointment of the trustees in this case."

Now if you gentlemen want to offer any evidence on what is said there or want to make any comment, this is the time to do it.

Mr. Gendel: Mr. Weller, will you take the stand, please?

I might state for the record that our position is that we do not have to build up a straw man or a steel man and knock him down. Our position still is that we have presented a prima facie case, and that, as the Circuit Court

has indicated, we have fully complied with all the requirements of law and the General Order; but just to satisfy any personal apprehension that this Court might have and so that the Court may not believe we are avoiding or evading anything by technicalities which we could, otherwise, rely upon, I think it is well for Mr. Weller to take the stand and answer some questions so that they will be in the record.

The Referee: Very well. Come forward, please, Mr. Weller. [25]

FRANK C. WELLER,

having been first duly sworn, testified as follows:

The Referee: Be seated, please. Your name is Frank C. Weller?

The Witness: That is right.

The Referee: Proceed.

Direct Examination

By Mr. Gendel:

Q. Mr. Weller, with what law firm are you associated?

A. Craig & Weller.

Q. For how many years have you been so associated?

A. About twenty years.

Q. Before that you were independently in the practice of law, were you, in the City of Los Angeles?

A. More or less independent.

Q. Mr. Weller, so that there will be no question about the name situation, there was at one time a Los Angeles Wholesalers Board of Trade; is that correct?

A. That's correct.

Q. At what address did they have their offices?

A. 111 West Seventh Street.

(Testimony of Frank C. Weller)

Q.    What was their telephone number?

A.    TRinity 5531.

Q.    Was the firm of Craig & Weller counsel for that organization? [26]

A.    It was.

Q.    When was that firm dissolved?

A.    You refer to the Los Angeles Wholesalers Board of Trade?

Q.    Yes, sir.

A.    Well, my best recollection is that the Los Angeles Wholesalers Board of Trade merged with the Los Angeles Credit Managers Association approximately two years prior to the time that this Petition in issue here was filed with this Court. I handled the legal matters in connection with the merger; and since that time what was the Los Angeles Wholesalers Board of Trade is a part of the Los Angeles Credit Managers Association and known as the Adjustment Bureau of that Association.

Q.    That is, since approximately three years ago from the current date; is that right?

A.    Approximately. That is my best recollection. I don't recall the exact date.

Q.    Now, Mr. Weller, when the copy of the letter from the Hotel Stratford was called to your attention in January of 1946, did you make any investigation to determine whether or not any one, either in your law firm or in the Los Angeles Credit Managers Association, had any knowledge of or connection with the issuance of that letter?

A.    Yes, I did.

Q.    What did you do? [27]

A.    Well, Mr. Tobin and I talked the situation over. Of course that is the first we knew of any such thing, was when the Referee here called the matter to our atten-

(Testimony of Frank C. Weller)

tion—or it was called to our attention perhaps by some one else; but I think the Referee called it to our attention.

Q. For chronological purposes will you answer this, please? Did you or any one that you know of have any notice or knowledge of any nature or character that letters of this type were being sent out by any one at any time that claims were being voted for the election of a Trustee?

A. None whatsoever.

Q. That, I believe, occurred on January 2nd and 3rd of 1946? A. Yes.

Q. All right, go ahead.

A. And then I talked with Mr. Engelman, of the Adjustment Bureau of the Los Angeles Credit Managers Association, after I had received this information that such a letter had been received by the Referee; and he said he certainly didn't know anything about it and that they had never contacted any one connected with the Christ's Church of the Golden Rule and it was totally without the knowledge of any one in their department.

Q. Now, Mr. Weller, did you have any contact at any time, directly or indirectly, through any principal, attorney, agent, or representative of the Bankrupt, with [28] reference to any arrangement concerning the filing or voting of proofs of claim?

A. No, I certainly did not. As a matter of fact, to the best of my knowledge I never met any one or talked to any one who was in any way connected with Christ's Church of the Golden Rule prior to the first meeting of creditors up here.

Q. Did you make a check of the claims which were voted through your power of attorney on behalf of the Los Angeles Credit Managers Association Adjustment



(Testimony of Frank C. Weller)

Bureau and the San Francisco Board of Trade to ascertain whether any claims were voted that were solicited by this type of letter in electing the Trustees?

A. Well, my recollection in talking the matter over with Mr. Engelman is that there was nothing in any of the claims which came in which indicated that they were the result of that letter.

Q. Those claims that were filed with the Court were on the forms provided by the Los Angeles Credit Managers Association or the San Francisco Board of Trade; is that correct? A. That's right.

Q. Now do you know whether or not either you or Mr. Tobin of your firm has made any arrangement or has any understanding, directly or indirectly, with any person connected with the debtor or Bankrupt or any one on behalf of [29] the debtor or bankrupt whereby you would be under any obligation of any nature or character?

A. None whatsoever.

Q. Do you know anything about the sending of the letter that the Court has referred to or anything about it?

A. No, I know nothing whatsoever about it.

Q. Do you feel that if you were employed as attorney, or as one of the attorneys for the Trustees you would be under any kind of obligation, directly or indirectly, on behalf of the Bankrupt or counsel for the Bankrupt or any one representing the Bankrupt?

A. No, none whatsoever.

Mr. Gendel: Is there anything further your Honor would like to inquire about?

The Referee: You finish your questioning.



(Testimony of Frank C. Weller)

Mr. Gendel: Q. Mr. Weller, since you are both a witness and an attorney, is there anything you would like to add? A. I don't know of anything further.

Mr. Gendel: That is all from Mr. Weller, your Honor.

### Examination

By the Referee:

Q. Mr. Weller, reading from page 9 of the Order which was reversed by the Circuit Court of Appeals—rather, on page 17—we find this statement: (Reading)

“It appears that some time ago the Los Angeles [30] Wholesalers Board of Trade underwent some sort of reorganization and that the new entity is known as Los Angeles Credit Managers Association. However, in bankruptcy circles the organization is still familiarly referred to as the Board of Trade.”

Would you say that that was true or not true?

A. I think it is quite frequently referred to as the Board of Trade.

Q. I am speaking of the time when this Order was made in January of 1946. Would you say that statement was true or untrue?

A. I think it is a pretty fair statement. I couldn't say categorically that it was true or untrue; but I think it is a fair statement that sometimes it was referred to—still is referred to—as the Board of Trade in bankruptcy circles.

Q. Now, then, the Order goes on to say: (Rearring)

“ . . . Indeed, the current telephone directory still lists the Los Angeles Wholesalers Board of Trade as a subscriber.”

(Testimony of Frank C. Weller)

Would you say that statement was true or untrue?

A. Yes, that was true.

Q. Then the Order goes on to say: (Reading)

"It has been suggested that the writer of the Hotel Stratford letters, above mentioned, did not intend to refer to the Board of Trade, customarily [31] represented by Craig & Weller, for the reason that the address and telephone number given in the letter for the Board of Trade are not those of the entity which is now known as Los Angeles Credit Managers Association. I am entirely satisfied that the writer of the letters did intend to refer to the Board of Trade represented by Craig & Weller and that the erroneous address and telephone number were secured from the current telephone directory, in which there appears this listing: Board of Trade, L. A. Retail Board of Trade, 704 So. Spring, TRinity 2614."

Do you question that conclusion, Mr. Weller, that the writer of the letter did intend to refer to the Board of Trade that you represent?

A. Of course it would be impossible for me, Judge, to testify as to what was in the mind of the person that wrote the letter. I don't know.

Q. You do not know? And you made no effort to find out? A. No, I didn't make any effort.

Q. And, so far as you know, the Board of Trade which you represent made no effort to find out why the writer of the Hotel Stratford letters referred to a Board of Trade? A. As far as I know.

Q. Well, Mr. Weller, what creditors in this case did [32] your office represent before this proceeding was commenced on November 1, 1945?

(Testimony of Frank C. Weller)

A. Very frankly, I couldn't recall, Judge.

Q. You don't know? A. No.

Q. In the certificate on review in connection with the Order with which we are here concerned is incorporated a letter dated December 26, 1945, written by the Board of Trade of San Francisco to Mr. Engelman, manager of the Los Angeles Credit Managers Association, in which the statement, among other things, is made: (Reading)

"At the request of Mr. Fortner, of your office, I left for Willits last Friday afternoon to solicit proofs of claim of creditors of Denton-James Sawmill."

The letter is captioned "Re Christ's Church of the Golden Rule, Bankrupt."

Also in the same letter the statement is made: (Reading)

"Mr. Conners, attorney for the Board of Trade, will send a substitution of attorney to Attorneys Weller & Tobin for their use in voting the enclosed proofs and any other claims received."

What, if anything, did you personally have to do with the solicitation of claims to be voted by you or your firm in the matter of Christ's Church of the Golden Rule?

A. I don't think, to the best of my knowledge, that I [33] had anything at all personally to do personally with the solicitation of—

Q. (Interrupting) Did you know it was going on?

A. I don't know whether I knew it when it started or not, but I knew subsequently that it was going on, yes.

Q. You knew that before you voted the claims; is that it? A. Oh, yes, yes.

(Testimony of Frank C. Weller)

Q. Do you know whether at the first meeting of creditors you voted any claim of any creditor that your firm represented at the commencement of this proceeding or the Board of Trade of Los Angeles represented at the commencement of the proceeding?

A. There has been considerable time elapse since then, Judge. I couldn't recall definitely the name of any particular creditor at this time.

Q. Mr. Weller, what was your first contact with this case?

A. I think the first I ever heard of this case, if I recall correctly, was through Mr. Hunt. I believe Mr. Hunt mentioned the fact that there was such a case.

Q. Did you have any conversation at all with any of the officers of the Bankrupt Corporation? A. No.

Q. You know Mr. Utley of course, the former Referee, who appears in the record as one of the attorneys for the [34] Bankrupt Corporation? A. That's right.

Q. Did you have any conversation with Mr. Utley about this case?

A. Not that I can ever recall—unless I met him on the street some day or something and might have had an informal talk about it. That would be all. I don't recall.

Q. You don't remember whether you did or not; is that right?

A. To the best of my knowledge I didn't. I don't think I did. I can't recall it now.

The Referee: All right, we shall take a short recess at this time.

(Recess.)



The Referee: Well, gentlemen, in order not to prolong this hearing I should like to suggest to you that the Order which was made on January 22, 1946, which is captioned "Order Denying Petition of Trustees for Leave to Employ Certain Counsel" sets forth in detail the reasons and the grounds upon which the order was made. I would like to ask you gentlemen if either any of you or the Trustees deny the truth of any statement of fact that is made in that Order.

Mr. Gendel: That is a rather broad question if I may bear the moving oar on behalf of the Trustees and the Petitioners in Intervention. But let us put our position on [35] this basis: We deny that—if the Court's conclusion is supposed to be grounded upon a fact found in those pages of memorandum, we deny that any one of the attorneys named, Frank C. Weller, Thomas S. Tobin, and Martin Gendel, had any connection, directly or indirectly, of any nature or character with the debtor, the bankrupt, counsel for the debtor or the bankrupt, which includes the Honorable Ernest Utley, or any one else on behalf of those persons as far as anything in connection with the case is concerned—including the solicitation of any claims.

The Referee: Are you making the statement, Mr. Gendel, that you had no conversation with Ernest R. Utley about Christ's Church of the Golden Rule before you appeared in this court on January 2, 1946?

Mr. Gendel: Other than meeting him here in the court room on December 4, 1945, which was the date of the first meeting of creditors, yes.

The Referee: And you did not have any conversation with him in any manner whatsoever?

Mr. Gendel: Relating to Christ's Church of the Golden Rule? That is right. None of us had anything to do with



either Mr. Utley, any one in his office, or the bankrupt or any one on his behalf in connection with this case and the solicitation of any claims. The difficulty, your Honor, in answering the Court's claim is that your Honor has started with a conclusion and then has built more conclusions on [36] those conclusions. If we could start at a fact and work from that basis on, we would be able to answer that question a little more specifically. As far as the particular letter your Honor refers to in your memorandum on letters, we deny that the Los Angeles Credit Managers Association Adjustment Bureau and/or the former Board of Trade had any connection of any nature or character whatsoever with the sending out of those letters. Your Honor has asked a question previously as to how they happened to designate the Los Angeles Board of Trade as they did in the letter. I can guess, the same as the Court can. We appeared on December 4, 1945, with, at that time, approximately the same claims which were voted and recognized by your Honor on January 2nd and 3rd. And it was obvious whom Mr. Weller represented. As is indicated by the Court, he has been counsel for that group for many years. I think that at the very last meeting, which was apparently December 29th or December 31st, the two dates borne on those two letters, the Bankrupt became aware of the solicitation by the Attorney General of proofs of claims, which evidence was produced at the hearing on January 2nd and 3rd. And I think that then, perhaps in a desire to choose the frying pan over the fire, they sent out this type of letter, feeling that it would be possibly more pleasant for them to be in the clutches of the attorneys who had already indicated their position in voting claims, than to be in the clutches [37] directly of the office of the Attorney General

of the State of California. Now that is purely my guess. I do not know anything about it for the reason that we had no connection whatsoever, as has been indicated, with the Bankrupt or any one on his behalf. Therefore, your Honor, in asking questions of Mr. Boteler and Mr. Weller, questions about investigations, is asking us to prove an unnecessary fact. We know whether we had any contact with those people or not. We do not have to investigate that fact.

Your Honor says you are not questioning the qualification of any counsel; but the line of questions put to Mr. Weller indicates that the sworn Affidavit is perhaps being questioned to some extent as to his connections. I don't know in what manner your Honor wants a denial of the fourteen-page memorandum of January 22nd, because we have specifically and generally denied any connection whatsoever with the debtor at the time that the Petition was filed. We are glad to renew that denial under oath as of this date if it will be of any assistance. The only facts we concede in this case are that the letters were received by two creditors, neither of these creditors participating in the election of the Trustees, one dated apparently December 29, 1945, the other dated apparently December 31, 1945, referring to the fact that Raphael Wechter and the Los Angeles Board of Trade at the Spring Street address and with the telephone number [38] listed for it, were representing unsecured creditors. Those are the only facts in those fourteen pages. From there on it is the opinion of the Trustees and the suggested counsel for the Trustees that the Court has built up the conclusion that in some way some one might then be suspicious that there was a basis for any connection between the Bankrupt or some one on behalf of the Bankrupt and counsel.

The Referee: Just a minute.

Mr. Hunt, here is a message for you. (Handing a paper to Mr. Hunt.)

Mr. Gendel: I do not know whether the record shows it, your Honor; but with reference to the letter from San Francisco—I forget who wrote it—that letter was presented to your Honor on, I believe, January 3rd of 1946 in connection with the determination by your Honor whether or not the Attorney General of the State of California or Messrs. Craig & Weller were in a position to vote claims, the issue of solicitation having been raised. And after your Honor read the letter and heard the statement of facts with reference to the conduct of both the Los Angeles Credit Managers Adjustment Bureau and the Attorney General of the State of California, you made the ruling that neither entity or their representatives were to be disqualified because of alleged solicitation.

The Referee: That was as to the voting of claims.

Mr. Gendel: That is correct. [39]

The Referee: All right, now I think that in deciding the question which was before the Referee on the Petition of the Trustees for Leave to Employ Counsel the Referee might well take into consideration whether the attorneys that the Trustees wished to employ were in the case as a matter of right, because they represented creditors in the case at the outset of the case, or whether they were in the case merely because they had rustled up some claims that they might have the opportunity to vote and to put thereby somebody in as Trustee and in turn get the position of attorneys for the Trustees. I think that is something the Court should take into consideration.

Mr. Gendel: Your Honor has the testimony of Mr. Weller. I suppose that that ought to be sufficient as to his possible connection. I do not know whether your Honor wants my testimony or not. I shall be glad to give it if required.

The Referee: I am going to put the case in this condition: I am going to give you gentlemen an opportunity to offer any evidence you care to offer on any matter set forth in the Order denying the Petition of the Trustees for Leave to Employ Certain Counsel made January 22, 1946, in the Referee's certificate on review in this matter, which was filed in the Clerk's office on January 30, 1946, and in the Supplement to the Referee's certificate on Petition for Review, which was filed in the Clerk's office on May 24, 1946. In the absence of any showing to the contrary the [40] Referee, in now again passing on the Trustees' Petition, will make the finding that all the matters of fact set up in or contained in the instruments mentioned are true. I shall continue the matter to a day certain and give you an opportunity to examine those papers and offer such evidence as you may wish to offer, it being understood that in the absence of evidence the Referee will make a finding that the statements made or the matters contained in the instruments mentioned are true.

Mr. Gendel: What is the Supplementary Certificate, your Honor?

The Referee: You may read it for yourself, Mr. Gendel. It belongs in the Clerk's file. We have it here for the purpose of this hearing.

When do you want to take the matter up?

Mr. Gendel: May I see the Certificate? We may not want a continuance, your Honor.



The Referee: Yes. (Handing a document to counsel.)

Mr. Gendel: Your Honor, will the Court accept an offer of proof that Mr. Weller, if called to testify, will further testify that, as to the specific documents in the Supplement to the Referee's Certificate on Petition for Review, which is dated May 24, 1946, neither he nor any one to his knowledge had any contact with the persons purporting to send out these various documents, and that he had no knowledge concerning their origin nor the reasons for their [41] origin? Will your Honor accept that offer of proof?

The Referee: Yes, if you say that he would so testify.

Mr. Gendel: Yes, he would so testify.

The Referee: Is there anything else? Do you want a continuance or—

Mr. Gendel (Interrupting): For what purpose, your Honor?

The Referee: I have told you, that in the absence of any evidence the Court will make a finding that all of the matters of fact set forth in or contained in the instruments already mentioned are true.

Mr. Gendel: Would your Honor indicate what the findings of fact would be? I have no way of knowing from your memorandum.

The Referee: I am not going to indicate anything. You have an opportunity to read it.

Mr. Gendel: We have had an opportunity to read it. There is nothing to indicate that findings of fact—

The Referee (Interrupting): I am going to make findings of fact. That is why I say I am going to give you an opportunity to offer any evidence you wish to offer. If you do not wish to offer any evidence, I am going to



make formal findings of fact that all of the matters contained in the instruments mentioned are true, and I am going to draw my conclusions from those findings of fact. That is why if you want an opportunity you may have it to offer any evidence [42] on those questions.

Mr. Gendel: Perhaps I am being a little obtuse, it being a little late in the afternoon; but I do not quite follow what matters your Honor has in mind.

The Referee: Mr. Gendel, you persuaded the Ninth Circuit to give you a hearing. You have a hearing. Now go forward and present any evidence you want to.

Mr. Gendel: We have presented evidence that we have no connection with the Bankrupt or any one connected with it. What more are we supposed to do? Are these letters to overcome the Court's indicated opinion that only in the rarest cases should the Trustees' selection be denied? Shall we produce the debtor or the Bankrupt and put him under oath and have him testify that he never talked to anybody connected with the Los Angeles Credit Managers Association or Craig & Weller, Thomas S. Tobin, and Martin Gendel? Would that convince your Honor?

The Referee: Mr. Gendel, as an intelligent individual I am not going to take for granted that the typist at the Hotel Stratford picked out "Board of Trade" from the thin air and wrote it down on a piece of paper. She got it from somewhere.

Mr. Gendel: I think your Honor could likewise consider the fact that the Los Angeles Credit Managers Association appeared through Messrs. Craig & Weller on December 4, 1945, with a nice sheaf of proofs of claim. I think [43] probably the same batch of claims they had on January 2nd and 3rd. That would not be very hard to add together as two and two.

The Referee: All right—

Mr. Gendel (Interrupting): We are quite willing to—

The Referee (Interrupting): Gentlemen, I am not going to try your case for you. I am not an attorney here. I am the Judge. You are here. You have an opportunity to present whatever evidence you want to produce. If you do not want to produce anything further, I shall mark the matter submitted.

Mr. Gendel: Well, I think that out of an abundance of precaution, since it may be necessary to go back up the ladder again, we shall consent to the suggested continuance. Perhaps I am as I have indicated, a little obtuse this afternoon. I should like an opportunity to discuss the matter with my co-counsel and with the Trustees.

The Referee: All right, when do you want to take it up?

Mr. Gendel: Since this is apparently running into considerable money, which, if I understand the law correctly, is not collectible from the Referee personally, we should like it as soon as possible. Where is Mr. Bell? Does your Honor know? Is he in jail?

Mr. Hunt: I can answer that, your Honor. He just called me on the phone. Where he is I don't know. I imagine he is at home. [44]

Mr. Gendel: Is he available now?

Mr. Hunt: That is more than I can tell you. I never can find him.

The Referee: All right, what date do you want?

Mr. Gendel: How about Friday,—

Mr. Hunt (Interrupting): Wait a minute. I can say this, your Honor: Mr. Bell talked about meeting me and some others to discuss tax matters tomorrow.

Mr. Gendel: How about Friday, your Honor, at 2 o'clock?

The Referee: Subject to a matter that is set in the morning—I do not think it will go over, it is not the Church case—I shall be glad to set it on Friday at 2 o'clock.

Mr. Gendel: Thank you, sir.

The Referee: All right, the matter is continued to December 20, 1946, at 2 p. m. [45]

Los Angeles, California, Friday, December 20, 1946,  
2 p. m.

The Referee: Christ's Church of the Golden Rule.

Mr. Gendel: Your Honor, we have been unable to locate Mr. Bell; and Mr. Utley this morning informed me that he had received word that Mr. Bell was probably in San Francisco. Mr. Utley suggested that the next time he was at all certain Mr. Bell would be available would be on the anniversary of this matter, on the 2nd of January, 1947. He said he had some court hearings and felt certain he would be before your Honor on that date. So, since we are of the opinion that the only person who could tell us what was in his mind and what motivated his sending out the letters which have concerned your Honor for a year, if he had any hand in it, would be Mr. Bell himself, I presume that we had better not try to introduce secondary evidence in the form of any employee who might say, "Yes, I sent out the letter; but somebody else told me to do it." We might as well go to the source. Then we can inquire as to why those letters were sent out. Then we can have both sides of the evidence, that indicated by Mr. Weller's testimony and the Affidavits and that indicated by the testimony

of Mr. Bell. I do not like to delay. This case has become most aggravating and irritating, because, computed on the per diem as reflected on the applications now before your [46] Honor, each day costs—I don't know how much but a sizable amount of money, depending on your Honor's ultimate decision on the application for fees. However, I do not know of any other way to answer your Honor's inquiry as to why the letters were sent out; so I think all we can do with reference to the matter is to continue the hearing.

Before that is done, however, I want to call two matters to your Honor's attention. One is that we had understood a mandate had come down and had been spread at the time we filed a petition for the hearing, as is now before your Honor; but we were informed this week that the mandate had come down only during the week. Mr. Chichester on our behalf, the Trustees' behalf, then had the mandate spread on the records and the minutes of Judge Mathes's court. I think it might be appropriate at this time, to eliminate any uncertainty in the record, that the Trustees move for an order of this Court permitting the consideration of the Petition and the testimony heretofore given, as if those items were present, after the spreading of the mandate if that is proper. I do not know just what jurisdictional effect our filing the Petition for a hearing has, whether it was of such a nature that it is a nullity or whether your Honor could now, by more or less of a recognizing order, permit the Petition and the testimony given to that effect, say, as of today, which is after the spreading of the mandate. It seems to me it would be an idle act for [47] us to refile a Petition for a hearing and start the matter over as of now and then have Mr. Weller testify.



The Referee: All right, if it is necessary, the record may show that the Petition for hearing in this matter and the Order fixing the time of the hearing may be deemed to have been filed subsequent to the time when the mandate was spread on the minutes of Judge Mathes's court, and that the proceedings had in this matter on December 16, 1946, before this Court may be deemed to have been had subsequent to the time that the mandate was spread on the minutes of Judge Mathes's court.

Mr. Gendel: Thank you, your Honor. Now the second item that concerns us is this: As your Honor will recall, when the matter was first presented for review to Judge Mathes, pursuant to your Orders of January 14th and January 22, 1946, the attorneys involved in the Petition, with the exception of Irving M. Walker, were permitted to intervene before Judge Mathes and then partook in the argument before Judge Mathes and before the Circuit Court as direct petitioners or appellants; and unless your Honor would have some objection to that type of procedure, I would like at this time, on behalf of Frank C. Weller, Thomas S. Tobin, and myself, to move to be allowed as Interveners in the hearing on the Petition of the Trustees now before your Honor.

The Referee: I do not think that such a motion is [48] necessary. I think the record shows, as you have indicated, that when the matter was pending before Judge Mathes on review Messrs. Craig & Weller; Mr. Tobin; and you, Mr. Gendel, were allowed by Judge Mathes to intervene as parties. Is that correct?

Mr. Gendel: Yes, that is correct, your Honor.

The Referee: I think that that was not changed in any way by the reversal of the Order by the Circuit



Court of Appeal and the direction that it be sent back for the purpose of having a hearing. So I consider that Craig & Weller; Mr. Tobin; and you, Mr. Gendel, are parties to the proceeding and I so regard you.

Mr. Gendel: You see, your Honor, my difficulty is that though I know it does not need a recognition from the Referee to acknowledge that there is an Order of the District Court, I do have the thought in mind that, since there is nothing in the Referee's records to indicate, as such, that there is an official acknowledgment of the attorneys as parties in interest, perhaps by a minute order, reflected in our oral Petition, then the records of the Referee might be made to show the recognition of the attorneys as parties to the hearing. The reason that I ask that is that in the event it should be necessary for any review to be taken then the record will be clear from its inception. We won't have to relate it back to any Order that was given back in February, 1946. [49]

The Referee: Suppose I make a note on our calendar here, which will be incorporated in our official docket, that the Referee finds that, pursuant to orders made by Judge Mathes in this case, Craig & Weller, Martin Gendel, and Thomas S. Tobin are parties to this proceeding?

Mr. Gendel: Fine, thank you. That would cover any ambiguity in the record.

Now to what hour would your Honor suggest the continuance on January 2nd? You probably have matters of more importance to the administration of the estate at the moment than our Petition for the Trustees. If it would accommodate the Court, I would just as soon have it set at 2 o'clock instead of 10 o'clock, which is probably the hour that the other matters are set for hearing.

The Referee: Just one second.

I have made this notation on our docket: The Referee finds that, pursuant to orders made by Judge Mathes in this proceeding, Craig & Weller, Martin Gendel, and Thomas S. Tobin are parties in the Trustees' Petition for Leave to Employ the said Frank C. Weller, Thomas S. Tobin, and Martin Gendel as their counsel in addition to Irving M. Walker.

Mr. Gendel: I think that that will cover it.

The Referee: That takes care of that?

Mr. Gendel: Yes.

The Referee: All right, let us get the 1947 calendar. [50]

Mr. Gendel: Mr. Utley informed me that on January 2nd—I think he said at 10 o'clock—your Honor had already set several important matters in the Christ's Church case, and that Mr. Bell would be here at that time. My suggestion was that if it would convenience the Court we could set this matter, then, for 2 o'clock that afternoon. That would clear your morning hearings, and we could have Mr. Bell here in the afternoon.

The Referee: Just a minute. I will get the calendar.  
(The Clerk enters with calendar, leaves.)

There are several contested matters set for Thursday, January 2nd, at 10 o'clock in the Church case in addition to three other matters in other cases.

Mr. Gendel: Would January 3rd be better for your Honor? Our only desire is just to eliminate too much delay on this.

The Referee: No, I think the afternoon of January 2nd.

Mr. Gendel: 2 o'clock?

The Referee: Yes.

Mr. Gendel: Well, out of an abundance of precaution, although we do hope Mr. Bell will cooperate with us by being present, I shall ask that the Clerk issue a new subpoena. Then we shall try to get service on Mr. Bell so that we can be sure we can proceed with our hearing.

The Referee: All right, the matter will be continued to January 2nd, at 2 p. m. I shall be glad to give you a hearing on any day you want, even before January 2nd, if [51] you wish to arrange that.

Mr. Gendel: Mr. Utley intimated that he had no contact with Mr. Bell. I asked him if it could be arranged in advance, to suit the convenience of Mr. Bell, so that we should not have to pounce on him with a subpoena at some time inconvenient to him. Mr. Utley said no, he thought we had better wait until January 2nd; so apparently I have no choice in the matter.

The Referee: Let it be understood that if for any reason you want to advance this hearing to some date before January 2nd we shall be glad to cooperate.

Mr. Gendel: Thank you, sir.

The Referee: I know of no reason why it could not be advanced, because there are no other parties entitled to be present other than the Trustees and the Interveners.

Mr. Gendel: Yes, Well, I have notified the Trustees individually;—

The Referee (Interrupting): We have that on file.

Mr. Gendel (Continuing): —and I shall repeat that notice for the matter on January 2nd or any earlier date.

The Referee: I am not concerned about that. All I wanted for the file was some definite assurance that all of the Trustees had actual notice of the fact that this hearing was going on.

Mr. Gendel: Yes, sir.

The Referee: The file does show that they had actual [52] notice of this hearing today, and it is not necessary to file any further notice to them.

Mr. Gendel: Thank you, sir.

The Referee: Very well. That is all. [53]

Los Angeles, California, Thursday, January 2, 1947,  
2 p. m.

The Referee: Christ's Church of the Golden Rule.

Mr. Gendel: Your Honor, I met Mr. Bell walking in the hall. I understood he was going to be here with us this afternoon.

The Referee: Yes.

(Mr. Bell enters.)

All right, you may proceed, Mr. Gendel.

Mr. Gendel: Mr. Bell, will you please take the stand?

ARTHUR L. BELL,

called as a witness, having first duly affirmed, testified as follows:

The Referee: Be seated, please. Your name is Arthur L. Bell?

The Witness: It is, sir.

Direct Examination

By Mr. Gendel:

Q. Mr. Bell, in December, 1945, you were connected with the Bankrupt Corporation; is that right?

A. I was, sir; still am.

Q. In what capacity?

A. President of Christ's Church of the Golden Rule. [54]

Q. Did that connection continue in the month of January, 1946, also? A. It did, sir.

Mr. Gendel: Your Honor, may I please have the exhibits in this hearing?

The Referee: What do you mean? Were there exhibits in the previous hearing on December 20th?

Mr. Gendel: The exhibits, your Honor, were the copies of the letters your Honor questioned.

(The Clerk enters.)

The Referee (To the Clerk): See if there are any exhibits, please, on the Petition to Employ Counsel in the Church case.

(The Clerk leaves.)

The Witness: Your Honor, may the record show that I have appeared voluntarily without the need of a subpoena being served on me?

The Referee: The record may so show.



(Testimony of Arthur L. Bell)

Perhaps if you will examine the Certificate on Review, you may find the papers you want, Mr. Gendel. In the meantime we will see if there are any formal exhibits.

(The Clerk enters, hands papers to the Court, leaves.)

Here you are, Mr. Gendel. (Handing papers to counsel)

Mr. Gendel: Oh, yes, the Certificate on Review I think will probably suffice.

Q. Now, Mr. Bell, may I call your attention, please, to [55] what might be described as a carbon copy of a communication on what purports to be the stationery of the Hotel Stratford, with the imprint "Hotel Stratford, 8th Street at Hoover, Los Angeles 5," and a carbon copy of a communication purporting to bear the date December 26, 1945. I ask you, please, to read that document. (Handing a paper to the witness) A. Yes.

Q. Now, Mr. Bell, I likewise direct your attention to another communication, this one appearing to bear the date December 31, 1945, likewise on what purports to be Hotel Stratford imprinted stationery, and ask you if you will please read that letter. (Handing a paper to the witness) A. It appears to be very similar.

Mr. Gendel: Now, your Honor, at the last hearing you referred to a Supplementary Certificate. Is that in this group?

(The Court hands a paper to counsel.)

Mr. Gendel: Thank you, sir.

Q. Now, Mr. Bell, I direct your attention to the documents contained in the Supplement to Referee's Certificate on Petition for Review of Orders, which Supplement is dated May 24, 1946. Now I ask you to look

(Testimony of Arthur L. Bell)

at what purports to be a charge ticket on Wolcott's, referring to a charge for Proof of Unsecured Debt and Letter of Attorney. (Handing a paper to the witness)

A. Yes. [56]

Q. Then next to it is a memorandum, apparently in duplicate, headed "P 36 B, American Laundry," with the names of apparently seven entities there, or persons, and ask you to examine that document. (Handing a document to the witness)

A. Yes.

Q. I think the one below it is a duplicate. Then I believe the last document is something that purports to be a carbon copy on a piece of plain white paper bearing date of December 28, 1945, and starting with the words, "Please check with all of our Oregon creditors," and ask you to read that document. (Handing a paper to the witness)

A. Yes, I have read it.

Q. Now, Mr. Bell, what, if anything, did you have to do with the sending out of those documents?

A. Well, I think I had considerable to do with it.

Q. In other words, you are familiar with those documents, are you?

A. I am familiar, yes.

Q. Why were they sent out? Just tell us the circumstances.

A. I will send my memory back. A great deal has happened in the last year or more. I think I can remember enough, however, to put together the picture. When I went, as President of Christ's Church of the Golden Rule, to interview Mr. Utley, of Utley & Cobb, in company with Mr. A. L. Wirin, one of our attorneys, at the request of Mr. Parsons, [57] who was at that time up in Oregon, we had an extensive interview on the possibility of our acting under the bankruptcy laws

(Testimony of Arthur L. Bell)

to obtain what we thought would be protection against some very unjust persecution and interference with our rights of religious freedom. I mentioned to Mr. Utley that our major problem consisted of having the resources of our Church and its very valuable records put into the hands of responsible men in some responsible court that would be impersonal, impartial in its handling of our affairs; that there would be no prejudice and no declared intention to dissolve our Church, destroy our Church, break up our membership, or discredit the teachers or the teachings in our Church; that we felt the State Courts were not going to respect our rights of religious freedom; that we would have no protection; that we wanted to know if there was any law of any kind that would hold our assets until the audit had been finished, protect our creditors, whom we felt were not being protected. The Receiver had refused to pay bills, even utility bills. Our credit, that we had spent some years building up, assets worth millions of dollars, were being jeopardized. Crops we had planted in the Imperial Valley were being neglected. Our losses were running up very rapidly. Our creditors were being jeopardized. I asked Mr. Utley, if we filed a list of unsecured creditors, if when sufficient money had been acquired to pay those unsecured creditors our properties would be back in our hands; if we [58] could put up our total resources as a means of securing those listed creditors, if we would have again control of our Church when those creditors were paid. I understood from his explanation that that would be the case. My next question was whether or not there was any way our creditors could have some voice in the selection of our Trustees, our representatives,

(Testimony of Arthur L. Bell)

to make sure that our problem would not become a political football, that no prejudice would be used in dealing with us, but instead our assets would be protected until our creditors, our listed creditors on our schedules, had been paid and we could be assured that the enmity against our teachings and our Church and some of us in official positions would not have any part, or become any part, of a bankruptcy proceeding. He assured me that so soon as we had acquired sufficient in the way of money or had sold enough properties to pay the listed creditors, that we would be free of the jurisdiction of any Trustees or their attorneys—who might be under the Court until some legal period had passed and we could be relieved of the Bankruptcy court, but that we would have management and control. When I first talked to him, we thought we would have complete management and control under the jurisdiction of the Court. Later, when it became evident that Judge Mathes would not grant us that type of a proceeding, we would have to go into voluntary bankruptcy, we had further conversations; and once more he assured me that our [59] creditors would be in a position to control the situation. Ninety-five per cent of our creditors were our friends. We knew their first concern would be to protect us and to prevent our assets from being dissipated or to prevent this matter from becoming a political football used by Communists and those who hate our type of teachings to destroy us. He then told me of certain persons who could be trusted to act in an impartial manner.

He said, "Your creditors will have to elect some one. You have explained your problem to me. These persons have long experience in this matter. Your creditors,



(Testimony of Arthur L. Bell)

if they decide that they wish, instead of having their own separate attorneys in each instance, to have a group of experienced men to deal with this matter—I can assure you that there will be no prejudice; that your affairs will be protected; that great dispatch will be exercised to pay off these listed creditors; and that in a few weeks the matter would be over. I again asked him whether the creditors would have to select some one of their own acquaintance, some one within their own group, whether they would have the right to do so. I was told the courts would not deal in a friendly manner—would not be friendly towards the idea of strangers to bankruptcy proceedings acting as Trustees or attorneys for Trustees but instead would expect to have experienced—men experienced in bankruptcy procedure, and that our creditors, instead of meeting among themselves and deciding whom they [60] would select and whom we could be sure would protect our rights and not permit any dissipation of our resources to take place or any delay—that it would be better, that it would be advisable, have experienced bankruptcy men carrying on the negotiations; that I need have no fear but that nothing would at any time be permitted to take place by those men who would waste any time in the Bankruptcy Court, any of our resources, or permit the matter to become a political football as it had become with the Attorney General's office and his political appointees; that they would be kept out of the picture entirely. I asked him for the names of certain persons who had had experience and whom we could advise our clients would be prepared to handle this matter in an impartial and impersonal manner and who were supposed to be men he had known for many years and that he



(Testimony of Arthur L. Bell)

could guarantee would have no prejudice in any of our dealings. He named Mr. — I forget, it begins with a G—

The Referee: Goggin?

The Witness: Mr. Goggin was one; and at that time it was our opinion that only one Trustee would be needed. I could take the time to be in daily contact with him and be sure he would understand every phase of our problems—and they were intricate and complex, as the Court has discovered. I wanted only one as I couldn't train half a dozen or even three. But I could take one. He assured me Mr. Goggin, if our creditors wanted him, would be the one that would be able [61] to handle this matter. He says, "If something should happen he couldn't come in, Mr. Sampsell would be the second best." Then I believe he mentioned your firm of attorneys. I don't recall him mentioning any other firm at the time.

Q. When you say "your firm of attorneys," what name do you mean he mentioned?

A. Let me check just a moment. I think he said the matter would have to be handled in the court by the Board of Trade, and he mentioned some names. I don't recall at this time. In fact, at this time I don't even recall your name although I have heard it a number of times; but I have been going about twenty hours a day. The last week I think I have slept about one hour a night, and my memory is very fuzzy. However, he did mention several persons to me at that time; and the creditors were considerably disturbed over their treatment at the hands of the State Receiver, felt very much antagonistic over the manner of their dealings, felt they

(Testimony of Arthur L. Bell)

were being greatly jeopardized. And we went into bankruptcy to assure them and also assure our people that there would be no unnecessary raids upon our assets or our resources. We showed our good faith by putting all our affairs into the hands of the Federal Courts, feeling that the first and prime issue they would pass upon would be our rights of religious freedom. They were sworn to protect our rights. We felt we would get full protection. We assured our creditors that if they would place their affairs in the hands of certain persons [62] their rights would be protected. That seemed to be their principal interest. Sometimes I think it was more their interest than their desire to be paid. From the impression that came to me I gained the impression they were primarily interested in protecting us, our people, our membership. I think they would have gone to any lengths to protect us. They would have voted in friends, who could have assured us protection, instead of strangers who have been at the beck and call of our enemies, the Attorney General's office, and destroyed thousands of dollars of our assets by their animosity and their willingness to deal with the enemies of our teachings and the enemies of our Church. We could have had friends. As it stands, we have had persons who have been inclined to deal with and help our enemies.

Q. Now, Mr. Bell, may I direct your attention to these two letters that I have shown you previously, one dated December 29th, one dated December 31st? What led up—not a general discussion but particularly with reference to those letters—what led to the sending of those letters? This is the one, the one you are looking

(Testimony of Arthur L. Bell)

at now, dated December 31st; and the other is dated December 29th.

A. Mr. Utley told me that the claims had to be filed in a certain period of time; if they were going to have a vote on the election of Trustees that the things would have to be filed; that the election would be determined by the greatest number of creditors and amounts of claims. We wanted to be [63] sure that our claims came in and came in the hands of friends, not enemies.

Q. As of those dates you caused to be sent out a series of letters— A. (Interrupting) We did.

Q. (Continuing) —along the tenor of the two letters that you have been shown as exhibits?

A. That's right.

Q. Is that correct? A. That is right.

Q. And that was done around the 29th of December, was it? A. Whatever the date was, yes.

Q. Now in connection with those letters had you talked to any one connected with what you understood was the Los Angeles Board of Trade?

A. I don't recall who the person was, but I met some one about that time. Is there a Mr. Tobin?

The Referee: Thomas Tobin?

The Witness: Is there an attorney by the name of Tobin?

Mr. Gendel: Yes, a Thomas S. Tobin.

The Witness: In my memory I met some one by the name of Tobin.

What is your name, sir?

Mr. Gendel: Gendel is my name.

(Testimony of Arthur L. Bell)

The Witness: I don't recall whether I met you at that time or not. I can't recall now. [64]

The Referee: Tell us about your contact with Mr. Tobin. When was it, and what was said?

A. Whoever the gentleman was, your Honor, my question was whether, if our creditors placed their claims in their hands, we could be assured of the election of Trustees who would be strictly impersonal in their dealings; who would, with the greatest possible dispatch, pay off our listed creditors. We never dreamed that there was a likelihood of other creditors walking in at that time. In the meanwhile we had to pay off \$115,000. We could have paid it off in forty-eight hours by selling some cattle and a few other things. I wanted to know whether we could be sure that we could close this matter up with dispatch. I was assured that could be done, there would be no unnecessary delays.

Q. When would you say that conversation took place? Was it before or after January 2, 1946?

A. Those conversations with Mr. Utley and Mr. Wirin of course took place long before.

Q. True, but in this conversation you are now telling us about—it was not before the Trustees were elected?

A. I met Mr. Goggin before.

Q. How? A. I met Mr. Goggin before.

Q. Let's see—

A. (Interrupting) I believe I met one of the attorneys before. It is my memory that a conversation of a similar [65] type—

Mr. Gendel: Q. (Interrupting) You had a talk—

The Referee (Interrupting): Just a minute.



(Testimony of Arthur L. Bell)

The Witness: It seems that that took place around that time. It is my memory that the notice sent out to creditors to cooperate fully in filing their claims were only sent out when I felt in myself the assurance that the entire matter would be handled most impartially and impersonally.

The Referee: Q. Any way, it seems that the substance of your conversation with this gentleman who may have been Mr. Tobin was that if you advised creditors to place claims with him or his firm to be voted—

A. (Interrupting) I don't think it went so far; I don't think it went so far. There was no bargain connected; I merely asked him if claims were filed with him we could be sure that the election of a Trustee, since it would be a majority in number and amount—whether we could be assured of the election of Trustees who would be most impersonal in this matter and not permit it to become a political football.

Q. Would you now say that that conversation took place before the election of Trustees, which took place about January 3, 1946?

A. It is my belief that it did although it is strictly from memory.

Q. Now let us see if we can identify the individual. [66] Can you tell us with any degree of certainty who the individual was?

A. Judge, I never had any extended conversations with any one. We dropped in at Mr. Utley's office. I shook hands with him. Remarks like that I just made to you. There were no long conferences. I never became acquainted with the gentleman. Mr. Utley assured me he had known him for years.



(Testimony of Arthur L. Bell)

Q. Where did you have the conversation you are now trying to recall?

A. In Mr. Utley's office so far as I can recall.

Q. And whoever you talked to was introduced to you by Mr. Utley? A. Yes.

Q. Can you now tell us who the individual was, where he came from, what firm?

A. In my best memory I remember distinctly meeting Mr. Goggin. I remember meeting Mr. Sampsell. I believe I went over to Mr. Sampsell's office. I am hazy on that; either Mr. Sampsell's office or Mr. Utley's office.

Q. Yes?

A. At that time we thought that there would be but one Trustee. I wanted to see what caliber of man was going to occupy that position since I would be giving my authority over to him—a grand experience!

Q. Yes? [67]

Go ahead, please.

Mr. Gendel: Q. Can you describe to us the person that you talked to at Mr. Utley's office?

A. I have given you all I can give you.

Q. I do not mean just by name. Can you give us a physical description of the man?

A. I have gone as far as I can go. I couldn't go any further than that. I have met so many thousands of people I couldn't go any further than that. All I recall is I met some—but a hazy memory tells me I met Mr. Goggin. I am sure I met him. I met Mr. Sampsell. Certainly I met those two gentlemen. And I believe I met a Mr. Tobin. Now, gentlemen, let me see if I can recall. I can't go any further than that. Something has come up from time to time in the last year that makes me

(Testimony of Arthur L. Bell)

believe I met Mr. Tobin, something connected with the Board of Trade.

Is Mr. Tobin connected with the Board of Trade?

Mr. Gendel: He is associated with the firm of Craig & Weller.

The Witness: Has he ever acted for the Board of Trade?

The Referee: Yes, he is an attorney for the Board of Trade.

The Witness: Then he is the one.

Mr. Gendel: You could not describe him as to his person and his looks, though; is that right?

A. No. I have met too many people—and too infrequently. [68]

Q. Would you say this meeting took place before the New Year or after the New Year?

A. Oh, I believe it took place before.

Q. Do you recall that we held—

A. (Interrupting) I recall—I seem to recall meeting—a gentleman I did meet somewhere in—goodness sakes alive, between November—between the 1st of November and the 15th of December, somewhere in there, I could be sure to have met these men. And I believe I met Mr. Sampsell and Mr. Goggin early in November—

Q. (Interrupting) Do you recall, Mr. Bell,—

A. (Continuing)—1945.

Q. (Continuing)—a meeting of the creditors being held on December 4, 1945?

A. I met these gentlemen before that time.

Q. Do you recall the first meeting of December 4, 1945; do you recall being in the court room?

(Testimony of Arthur L. Bell)

A. I seem to. Remember, I have almost lived here. I can't place dates.

Q. The reason I thought it might stand out in your memory was that that was the first large gathering of persons after a notice to creditors. I don't know whether this incident would refresh your recollection, but I think it was on that occasion that the Attorney General asked for a continuance of the first meeting of creditors.

A. I believe so. I believe I recall it. [69]

Q. With reference to that date, which I believe the record shows was December 4, 1945, do you now recall when you had the conversation that you have related to us with the person that you think was Mr. Tobin?

A. It must have been before that time, I believe.

Q. You think it was before?

A. Somewhere at the back of my memory I get that impression. It may have been about that date. I can't recall.

Q. The reason I ask you that question, Mr. Bell, is that I am a little bit puzzled as to why these letters were sent out on the 29th or the 31st of December. Do the dates mean anything to you now? Can you reconstruct what took place?

A. I might if you can refresh my memory a little bit. When were the Receivers appointed, the three Receivers, what date?

The Referee: November 19, 1945.

Mr. Gendel: What was that date, your Honor?

The Referee: November 19, 1945.

The Witness: I met these people before that time.

(Testimony of Arthur L. Bell)

Q. By Mr. Gendel: On December 4, 1945, the Court continued the first meeting of creditors to January 2, 1946. A. I met them before November 19th.

Q. Whoever it was you met, you think you met him at that time? A. Yes.

Q. If you recall, will you tell us why these [70] communications were apparently sent out around the 29th of December, 1945?

A. Evidently the claims were not coming in fast enough. Evidently we were approaching a time or there was a maximum limit of time when the Trustees would have to be elected. You see, there wouldn't have been even half of these creditor claims filed except that our people went to these creditors and assured them that it was the purpose of the corporation to make sure that they were properly protected, their claims were filed in time, and that it was our desire to stand in back of their claims and make sure they got dollar for dollar, and that there must be no neglect. We felt that if they tried to hire separate attorneys, it would only cause confusion; and if they permitted the Attorney General to handle their claims it would almost assuredly guarantee our quick dissolution and the destruction of our Church. Our creditors were our friends. They were people who had dealt with us a long time, who respected us and trusted us.

Q. Mr. Bell, just to refresh your recollection, if it does, when did you first discover that the Attorney General, through his office, was soliciting claims to be used on January 2, 1946?

A. Well, we knew immediately when we filed the bankruptcy papers that the Attorney General would try to control the situation. He appeared in Judge Mathes'



(Testimony of Arthur L. Bell)

court, made every effort to dominate the situation, and has tried to dominate [71] it ever since.

Q. I am now asking you the question if it does recall any particular date to you as to when you found out the Attorney General was soliciting the unsecured creditors. I am not talking about those who might now have what now has turned out to be the so-called fraud claims against the Corporation, but I am talking about a solicitation by the Attorney General of unsecured creditors.

A. We knew the Attorney General had been trying to turn our people against us for a long time. We knew he would try to stir up as many antagonistic issues as possible. But we discovered he was soliciting claims shortly after we filed papers in bankruptcy, that he desired to dominate the situation; and we couldn't remain passive and permit him to achieve that result. We had run away from the State Court that we might find some greater protection and respect for religious freedom than the State Court had. If the Attorney General could dominate the situation, we were very sure we could not get protection.

Q. Mr. Bell, the question I am asking you is this: Did you discover that the Attorney General was soliciting the unsecured trade creditors, the ordinary trade creditors, after December 4, 1945?

A. Oh, I think—just on memory I am not positive on this; but I think that we became aware of his attempt to dominate the creditor situation somewhere in November. I [72] could be wrong, but that is my memory now.

Q. If you do now recall, what I am now trying to get at is what were the facts behind your causing these letters to be sent out on as late a date as December 29th, De-



(Testimony of Arthur L. Bell)

cember 31st, for an election that was taking place on the 2nd of January?

A. Evidently all of the creditors had not yet filed. There may have been many who had, but there must have been some who hadn't.

Q. Do you now recall within your own knowledge, your own recollection, what took place at or about the date December 29, 1945, that led to the sending, for example, of the letter dated December 29, 1945?

A. I can't imagine except that there must have been a few who hadn't filed their claims or a considerable number who hadn't, and that we knew that if we were going to have an election here it would have to be a majority in number and amount.

Q. Mr. Bell, I do not want to cut you short on your explanation; but what we are trying to get now is not what you are imagining but what, if anything, you do recall.

A. That is the best of my recollection. You have asked me for it, and I have given it to you to the best of my memory.

Q. Do you have any definite—

A. (Interrupting) I know very definitely we went after these creditors because we wanted to be sure of a majority in [73] amount and number at that moment.

Q. You wanted to be sure; is that right?

A. That there would be a majority in amount and number who were friends, that we could be very, very certain that there would be no political football issues come up in this matter. If the Attorney General got hold of it, we knew that it would become a political football.

(Testimony of Arthur L. Bell)

Q. You wanted to be sure that the Attorney General did not control the majority in number and amount; is that right?

A. Yes, we wanted to be very sure of that.

Q. Other than this person you describe as Mr. Tobin and the conversation that you have given, did you ever meet with any one that you understood was in any way connected with the Board of Trade?

A. That is the only incident I can recall at this time, sir.

Q. Do you recall a man by the name of Raphael Dechter?

A. He wasn't connected with the Board of Trade;—

Q. (Interrupting) Do you recall Mr. Dechter?

A. (Continuing)—I don't think he was. Yes, I recall Mr. Dechter. I met him for the first time in Judge Mathe's court, some time between the 1st and the 18th of November. I don't know what the date is now, but I think it was early in November.

Q. Now have you given us— [74]

A. (Interrupting) The only conversations I ever had with Mr. Dechter were in Judge Mathes' court, and then a handshake and that's all; no conferences.

Q. Have you given us all the conversation, as you now recall it, as to what you said and as to what this gentleman you described as Mr. Tobin said on this one occasion?

A. I can't remember Mr. Tobin saying very much of anything. They accuse me of doing most of the talking. I think in that case I did. But I must have had his assurance that any one elected as a Trustee would be thoroughly impartial in his handling of our affairs and would

(Testimony of Arthur L. Bell)

guard against this matter of it becoming a political football and guard against our enemies' nominees of politicians turning it into a football. I must have had that assurance or he wouldn't have got my support otherwise. However, I haven't found assurances mean anything.

Q. Do you recall specifically what, if anything, Mr. Tobin, or this gentleman you think was Mr. Tobin, said to you in this conversation?

A. No, but his attitude must have indicated his assurance because I went to considerable lengths to make sure that claims were filed where they would be filed impersonally—as I thought.

Q. Was anything discussed by you and Mr. Tobin concerning the subject matter of whether or not you or any one else on behalf of the Corporation would control whoever would be [75] elected as Trustees?

A. Oh, at no time. There was no—I was assured there would be no need of that; that we could have these debts paid off as quickly as we sold some cattle and a few other things and probably have it back in our hands; and—didn't seem to be important.

Q. In other words, you did not discuss this subject matter at all with this gentleman you referred to as Mr. Tobin; is that right?

A. No, I am quite sure, I didn't discuss that.

Q. Do you know whether or not any of the claims which were covered by these letters around December 29, 1945, were voted pursuant to your letters on January 2, 1946?

A. Well—

Q. (Interrupting) Do you have any personal knowledge?

(Testimony of Arthur L. Bell)

A. I seem to remember Mr. Tobin or some one from the Board of Trade who was here voting claims. I can't recall now. Too much has happened.

Q. I do not know whether you know this or not, but apparently the record will show what was voted. I think their claims were voted on—

Your Honor, I do not want to misquote the record in helping this man refresh his recollection. When were the claims voted? I don't know whether it was December 4th or January 2nd.

The Referee: I do not know. What record will show that? [76] I do not think so. I think all the claims were voted on January 2nd, because my recollection is that at the request of the Attorney General we, on December 4, 1945, continued the first meeting of creditors for all purposes to January 2, 1946. It was apparent then that there would be a vigorous contest for the selection of Trustees. Later that month we authorized the employment of Arthur Young & Company for the estate upon the Petition of the then Receivers, and I recall that a day or two before December 31, 1945, I contacted Arthur Young & Company and asked them to send one of their auditors to this court on January 2, 1946, for the purpose of tabulating the claims that would be voted for Trustees. So, reasoning from that, I would say that all of the claims were probably voted on January 2, 1946. However, the only way to find out definitely whether or not any claims were voted on December 4, 1945, would be to consult the reporter's notes.

Mr. Gendel: Well, perhaps the thought I had in mind could be shown by the record. The claims may have been filed on December 4th.



(Testimony of Arthur L. Bell)

The Referee: But that of itself would not indicate whether they were voted the day they were filed. That is the trouble.

Mr. Gendel: The purpose we had in mind was not concerned with the voting of them.

The Referee: I shall get the list of claims so that we [77] can see when the claims were filed. But as to when they were voted, if they were voted on December 4th—

(The Clerk enters.)

(To the Clerk): Please bring me the list of claims in the case of Christ's Church of the Golden Rule.

(The Clerk leaves.)

If they were voted on December 4, 1945, that fact would be verified only by the reporter's notes. There is no other record here.

Let me see, did I forward with the Certificate on Review the auditors' tabulations? Yes, I did.

Mr. Gendel: I remember the gentleman's being present here on January 2nd.

The Referee: I forwarded the Certificate of Review, and it is a part of that record. The tabulations made by Mr. Brown, I think it was, of Arthur Young & Company, would show the number of claims voted, the amounts of the claims, and so forth. And his date is merely January 3, 1945.

Now the—

Mr. Gendel: (Interrupting) I am inclined to refresh my own recollection with the belief that when your Honor granted the motion for a continuance there was no voting for a Trustee on that first occasion of December 4th; but



(Testimony of Arthur L. Bell)

I am concerned in this question with whether or not the claims were filed on December 4th.

The Referee: Our record shows that the first claim [78] filed in this case was filed November 30, 1945; and on that claim Craig & Weller were named as attorneys in fact. On December 3, 1945, a claim was filed by a creditor without naming an attorney in fact—in fact, by two creditors. Then on December 4, 1945, there was one claim filed on which Craig & Weller were named as the attorneys in fact. And there were fifteen filed on which Craig & Weller and/or Thomas S. Tobin were named as attorneys in fact. And there was a claim filed on which Heim Goldman and James M. Conners were named as attorneys in fact. And on that claim Frank C. Weller and Thomas S. Tobin were later substituted for Heim Goldman and James M. Conners. Then on the same day there were twenty-five claims filed on which James M. Conners of San Francisco was named as attorney in fact. And as to all those claims Frank C. Weller and Thomas S. Tobin were later substituted for Mr. Conners.

Mr. Gendel: Were any claims, your Honor, according to the record there, filed on January 2nd by Craig & Weller, additional claims?

The Referee: All right. Now I have given you all the claims that were filed on or before December 4, 1945. Thereafter, between December 4, 1945, and January 2, 1946, several claims were filed on various dates, on which Craig & Weller, or Craig & Weller and Thomas S. Tobin, were named as attorneys in fact.

Then we get down to January 2, 1946. On that day among [79] others there were filed claims on which James

(Testimony of Arthur L. Bell)

M. Conners of San Francisco was named as attorney in fact; and as to those five claims Frank C. Weller and Thomas S. Tobin were later substituted for Mr. Conners. There were filed sixteen claims on which Craig & Weller and Thomas S. Tobin were named as attorneys in fact. There were on the same day a number of claims filed on which Mr. Raphael Dechter was named as attorney in fact. There were filed on the same day, January 2nd, a number of claims on which Robert W. Kenny, Attorney General of the State of California, was named as attorney in fact.

The first meeting of creditors was continued from January 2nd to January 3, 1946. On that day further claims were filed on which Robert W. Kenny was named as attorney in fact. That gives you the record on the claims.

Mr. Gendel: Q. Now, Mr. Bell, do you personally know—that is, of your own knowledge—whether or not any of these proofs of claims sent out—

I am sorry, your Honor, I shall need the Certificate on Review.

Q. (Continuing)—letters such as we have shown to you, those of December 29th and December 31st, were turned over to what you call the Board of Trade and filed by them? A. No.

Q. Do you know of your own knowledge?

A. No, I do not, sir. [80]

Q. Well, now, when your organization sent out a proof of claim—sent out a letter, I beg your pardon—such as the letter of December 29th or the letter of December 31st that have been exhibited to you, were there included in

(Testimony of Arthur L. Bell)

that envelope printed forms of proofs of claim which had been paid for by the invoice shown by the Supplemental Certificate contained in the record as heretofore shown to you?

A. I don't know. They may have been.

Q. Pardon me, sir?

A. They may have been. I do not know.

Q. Well, can you tell us now, if you know, what was done with the proofs of unsecured debt and letters of attorney shown on the Supplemental Certificate of the Referee?

A. I do not know unless they were filled out covering the respective creditors and sent through to them to sign, something of that kind. I do not recall now.

Q. Do you have any personal recollection, Mr. Bell, as to what was done, if anything, with the forms that had been purchased? First of all, let me ask you, Mr. Bell, whether you know anything about the purchase of these blank forms, these proofs of claim?

A. No, personally I do not.

Q. You do not? A. No.

Q. You would not very well be able to answer us, then, as to whether or not those particular forms accompanied these [81] letters dated December 29th and December 31st?

A. I know that some of our people helped the creditors wherever they could in filing their claims, told them they could select their own attorney or, if they cared to, file them with the Board of Trade or these other persons named; that the matter would be fairly handled and their interests would be protected and so on. That is all.

(Testimony of Arthur L. Bell)

Q. Mr. Bell, it is rather important to the Court and to the Petitioners to know whether or not you had any other conversations with any one that in your mind you can connect with the entity you call the Board of Trade other than this conversation you have described to us as having been had with a Mr. Tobin.

A. I don't recall at this time, sir. I evidently had sufficient assurance that the persons who would be elected would protect the interests of our people and our creditors.

Q. You might have received that assurance from Mr. Utley; is that not right? A. Might have, yes, sir.

Q. You see, I am trying to avoid the "might-haves" in this testimony if it is possible at all. Can you answer now whether or not you have any recollection at this time of talking to any one person who was in any way connected with the entity that you understood to be the Board of Trade? A. I do not recall at this time.

Q. And could you tell us at this time where you obtained [82] the name The Los Angeles Board of Trade, the address 704 South Spring, and the telephone number TRinity 2614?

A. Well, I will still have to guess. I imagine from Mr. Utley.

Q. Your recollection is that if you got it from anybody you got it from Mr. Utley; is that right?

A. That would be my recollection though I can't be sure of it. That would be my recollection.

Q. Now, Mr. Bell, have you ever spoken to any one, as far as you know, connected with the entity known as the Los Angeles Credit Managers Association?

A. I don't recall, sir. I don't know.



(Testimony of Arthur L. Bell)

Q. You have not heard that name before?

A. That name doesn't strike any responsive chord in my mind.

Mr. Gendel: Is there anything further, your Honor, you would care to inquire about from Mr. Bell?

The Referee: Yes.

### Examination

By the Referee:

Q. Mr. Bell, if you talked to Mr. Tobin, if that was the name of the man you had the conversation with you have related here, why did you talk to him? Whom was he representing?

A. Whomever the man I was talking to may have been, your [83] Honor, he was supposed to have been representing either the Board of Trade or some attorneys with whom the claims could be filed who would have authority to elect Trustees in this matter—

Q. (Interrupting) Yes?

A. (Continuing)—and make sure that a Trustee who would not be the pawn of the Attorney General's office but could be impersonal and impartial in his handling of our affairs would be elected.

Q. In your conversations with Mr. Utley in the early stages of this case was the name of the law firm Craig & Weller mentioned, do you recall?

A. I don't seem to recall, sir.

Q. You do not remember that?

A. I don't seem to remember.

Q. But Mr. Utley did mention to you that the Board of Trade attended to the filing—



(Testimony of Arthur L. Bell)

A. (Interrupting) I think Mr. Dechter was also supposed to have been able to handle such matters, to be experienced.

Q. Now, Mr. Bell, in November of 1945 Christ's Church of the Golden Rule embraced a rather farflung organization; is that true? A. It did, sir.

Q. You had some seven or eight hundred people directly connected with the organization?

A. Right. [84]

Q. And its entities or agencies or "projects," as you called them, were scattered all the way along the Pacific Coast from the State of Oregon to the Imperial Valley?

A. They were.

Q. Now in contacting your people did you always resort to the mails, or did you have other means of communication?

A. Telephone calls frequently to any one of the student minister training project managers to transmit the message to all the other student ministers in that location. I could make four phone calls and reach any of them in an hour's time up and down the Coast.

Q. Would you say that the letters that Mr. Gendel has pointed out to you and which appear to have been sent directly to creditors about December 29th or December 30, 1945, were the first things done by you with respect to getting the creditors to file their claims; or was there something else that was done before that?

A. Not at all, sir. I had over the telephone contacted whichever student minister training projects were necessary and impressed upon them the importance of advising with creditors and letting them know that the Attorney General's office would only wish to have their claims for

(Testimony of Arthur L. Bell)

the purpose of destroying our Church and that unless they would hire their own lawyers that they should place their claims in the hands of persons who would not be pledged to assist the Attorney General in destroying the Church and turning our membership [85] against us and if possible destroying our Church.

Q. In such communications or telephone conversations did you mention any names of persons or entities that the creditors should be advised were in a position to handle claims?

A. Whatever names Mr. Utley had given me.

Q. And what were they?

A. I mentioned the Board of Trade and Dechter's office. As I recall now—they were the two that seemed to stay in my memory—and Mr. Connors up North.

The Referee: All right, is there anything else you want to ask, Mr. Gendel?

Mr. Gendel: I would say this, to clarify the record, if there is any question about it:

Direct Examination (Continued)

By Mr. Gendel:

Q. Mr. Bell, did you ever meet me, Martin Gendel, before December 4, 1945?

A. I don't recall having done so. I may have, but I just don't remember—unless I might have met you in Judge Mathes' court. If you were there, I probably would have met you. But I can not recall any other meeting.

Mr. Gendel: Would it be necessary, your Honor, for me to testify in that respect?

The Referee: You may make any statement you want. You [86] do not need to be sworn.

(Testimony of Arthur L. Bell)

Mr. Gendel: The only statement I want to make, so that the record will be clear, is that I never saw Mr. Bell prior to December 4, 1945.

The Referee: Will you also make a statement, Mr. Gendel, as to how it happened that you were working with the attorneys for the Board of Trade in the selection of Trustees?

Mr. Gendel: Yes, for the purpose of the record, I was called for and told that they had a problem on their hands that apparently was bigger than they could handle themselves if they were employed as counsel for the Trustees, and in that case would I be willing to be associated as an attorney on a financial arrangement to be later reached for the handling of such matters as could be split up between the offices so that they would not be swamped with the rather tremendous task that they anticipated.

The Referee: I see. All right, is there anything else?

The Witness: May I make a statement here, your Honor?

The Referee: Surely.

The Witness: We are letting down our hair about this matter.

The Referee: Yes?

The Witness: For whatever it is worth, it is my opinion that the Trustees and their attorneys were elected, given the power they have held for the last year, by a trade with [87] the Attorney General's office: If the Attorney

(Testimony of Arthur L. Bell)

General could have McKee, he would let Mr. Sampsell and Mr. Boteler, or Mr. Goggin, come in. I think the matter was entirely framed, cut and dried. I do not believe the creditors obtained what they desired, what they wished. They would have elected some one they know would have protected their interests. They would not have elected strangers. If these creditors had known what was going to happen to us, we would have been out of bankruptcy in six or eight weeks' time, because we would have had the unsecured creditors paid off—at least under a plan of arrangement. They thought they were electing men who would protect their rights and not permit this matter to become a political football, not permit it to become a weapon in the hands of the Attorney General's office, as it unquestionably has become.

The Referee: Is there anything else? Anything else?

Mr. Gendel: No, but I would like to have a recess to see if I can get hold of Mr. Tobin.

The Referee: Very well. We shall take a recess.

(Recess.)

Mr. Bell: Your Honor, may the record show that I, at five minutes after 3, was served with a subpoena to appear at this hearing after I had completed my testimony?

The Referee: Yes.

All right, come forward, please, Mr. Tobin. [88]

THOMAS S. TOBIN,

having been first duly sworn, testified as follows:

The Referee: All right, be seated, please.

Your name is Thomas S. Tobin?

The Witness: Yes, your Honor.

The Referee: Proceed.

Direct Examination

By Mr. Gendel:

Q. Mr. Tobin, when was the first time that you met Mr. Arthur L. Bell, who is the President of the Bankrupt Corporation?

A. I imagine it was around the time of the first meeting of creditors.

Q. Where did this meeting take place?

A. My first recollection of meeting him at all was either here in this court room or at a lunch, a restaurant, the other side of Levy's, or this side of Levy's, when Mr. Utley and Mr. Bell's former attorney and I were sitting at a table eating and Mr. Bell came through and spoke to us and sat at another table.

Q. With reference to December 4, 1945, which meeting took place first?

A. I think, if I am not mistaken, it was the one at the restaurant, when he came through and Mr. Utley spoke to him.

Q. And about when did that meeting take place as you [89] now recall?

A. Oh, I couldn't recall.

Q. Well, keeping in mind the date of December 4, 1945, was it a year before or a month before?

A. Oh, no, it was right in around the time of the first meeting of the creditors in this case.



(Testimony of Thomas S. Tobin)

Q. And did you at that time have any conversation with Mr. Bell of any nature or character at all?

A. No.

Q. You did not talk to Mr. Bell personally; is that right?

A. No, I believe I was just simply introduced and that was all there was to it. He went on to his own table and sat down and ate his lunch.

Q. When, if at all, did you have any conversation directly with Mr. Bell other than such casual talk as you may have had in the court room? A. Never.

Q. Pardon me, sir? A. Never.

Q. Did you ever have a conversation with Mr. Bell in the office of his attorney, Ernest Utley?

A. Not that I recall, no. I don't recall ever seeing him there. If I did, it was a casual meeting that didn't register.

Q. Did you have at any time any conversation with Mr. Bell concerning the subject matter of the obtaining or voting [90] of proofs of claim? A. Never.

Q. Did you ever have any conversation with Mr. Bell concerning the subject matter of the election of any certain Trustees— A. (Interrupting) No.

Q. (Continuing)—in this case? A. No.

Q. Did you ever have any conversation with Mr. Bell concerning the subject matter of the treatment of the bankrupt entity with reference to politics or religion or matters of that character?

A. No. In fact, I paid very little attention to the election of a Trustee in this case.

Q. Now, Mr. Tobin, did you ever have any conversation with Mr. Bell, the substance of which was somewhat

(Testimony of Thomas S. Tobin)

as follows: a question by Mr. Bell of you as to whether or not if claims were voted by the Board of Trade impartial Trustees would be elected who were not prejudiced from a religious standpoint or who had no connection with the Attorney General?

A. No, I can't recall ever having had any such conversation with him or anybody else. In fact, I didn't know that Trustees were going to be elected until the deadlock developed in this Court.

Q. Now, Mr. Tobin, did you have any conversation with [91] any one else connected with Mr. Bell or his organization concerning the voting of proofs of claims or the election of Trustees? A. No.

Q. You are associated with the legal firm of Craig & Weller, are you? A. I am.

Q. And the law firm of Craig & Weller does represent the Los Angeles Credit Managers Association, formerly known as the Los Angeles Wholesalers Board of Trade; isn't that correct? A. That's right.

Q. Mr. Tobin, prior to, oh, let us say, January 4, 1946, did you know that the Bankrupt or some one in the direction or control of the Bankrupt or Mr. Bell was recommending that the Los Angeles Board of Trade be given powers of attorney in fact to vote proofs of claim?

A. No, I never knew a thing about it or heard anything about it until the disqualification occurred after the election.

Q. Just to be more specific about my questions, Mr. Tobin, I want to direct your attention to certain exhibits heretofore referred to this afternoon in your absence. I show you a letter dated December 29, 1945, on the stationery of the Hotel Stratford—I think you have ex-

(Testimony of Thomas S. Tobin)

amined all these documents heretofore—a letter dated December 31, 1945, on [92] the stationery of the Hotel Stratford; a charge ticket on Wolcotts for proof of unsecured debt; a typed list of persons under a heading of “P36B” and a copy thereof; and a copy of a communication dated December 28, 1945. I ask you whether or not you personally knew anything about the matters covered by any of those documents.

A. I did not. I saw these two letters on the stationery of the Hotel Stratford dated December 29, 1945, when I came down here and examined the file for the purpose of preparing a petition for review. I had never seen the others you have shown me until just now.

Q. Now let me broaden my question. Do you know anything about the sending out of those communications, whether in writing or by telephone or word of mouth or otherwise?

A. I do not, nor did not until I saw these two letters here in the file.

Q. Do you know anything more about it than what is shown by those two letters? A. Not a thing.

Q. Did you have any conversation with Mr. Bell or with any one on behalf of Mr. Bell or his organization with reference to the sending out of the specific documents that you have examined or the subject matter of the contacting of creditors on behalf of the entity that they described as the L. A. Board of Trade or Los Angeles Board of Trade?

A. Mr. Gendel, I have practiced bankruptcy law for [93] twenty-five years; and I did not in any way solicit, condone, nor consent to the Bankrupt's soliciting any proofs of debt.

(Testimony of Thomas S. Tobin)

Q. Just for the record, Mr. Tobin, I want Mr. Clay, the reporter, to read back my question so that we can have a direct yes or no answer in the record.

(The reporter read the question, as follows: "Q. Did you have any conversation with Mr. Bell or with any one on behalf of Mr. Bell or his organization with reference to the sending out of the specific documents that you have examined or the subject matter of the contacting of creditors on behalf of the entity that they described as the L. A. Board of Trade or Los Angeles Board of Trade?")

A. No.

Q. Or with reference to any contact with reference to the obtaining of proofs of claim or the election of a Trustee by the organization known as The Los Angeles Credit Managers Association? A. No.

Q. Do you of your own knowledge know whether or not any one in connection with the entity formerly known as the Board of Trade, now known as The Los Angeles Credit Managers Association, had any contact with Mr. Bell or any one on his behalf with reference to the obtaining of any proofs of claim for voting purposes in this case? A. No, so far as I know, nobody did. [94]

Q. Did you make an effort to inquire from the organization itself, their employees, in connection with the review as to whether any one had any contact of any nature?

A. I didn't make any specific inquiry, but I know from the talk that went on over there about our disqualification that nobody seemed to know about having contacted Mr. Bell or his organization.

Q. All of the representatives of the former Board of Trade, that is, the Los Angeles Credit Managers Associa-



(Testimony of Thomas S. Tobin)

tion, were aware of the ruling of the Court and the appeal pending and so forth?

A. Yes, sir. In fact, the Secretary and Manager of the Los Angeles Credit Managers Association, Mr. Johnson, insisted that the appeal be taken.

Q. Now, Mr. Tobin, since January 3, 1945, have you had conferences of conversations with Mr. Bell or any one on behalf of Mr. Bell or his organization concerning the election of Trustees?

A. I talked with Mr. Bell and Mr. Utley out here at the elevator once, after coming out of Judge Mathes's court, in connection with some order that I believe Referee Brink was there that morning on and on which he had stated a position to the Court. I believe you and I were there. I talked to Mr. Bell casually over at the elevator, and I don't believe that related to the election of Trustees. It was after the disqualification occurred. That is the only [95] time that I have ever talked to Mr. Bell that I can recall since the first meeting of creditors.

Q. At that time was there any discussion about what your position might or might not be if the Trustees' petition for your employment was granted? A. No.

Q. My question also included speaking to any one else on behalf of Mr. Bell or his organization in connection with the Trustees or the solicitation of claims or the obtaining of proofs of claims.

A. All that was done upon our floor, that is. The Credit Managers Association, was that a letter was sent out—

Q. (Interrupting) No, no, Mr. Tobin. I am asking you whether you personally—

A. (Interrupting) Oh, no.



(Testimony of Thomas S. Tobin)

Q. (Continuing)—have had any conversation since January 3, 1946, not only with Mr. Bell but any one on his behalf or his organization's behalf in connection with this proceeding?

A. No, and the same would go before that time, too.

Q. I understand that. You have already testified to that.

The Referee: Is there anything else?

Mr. Gendel: Not unless your Honor wants to ask any questions. [96]

The Referee: Yes.

#### Examination

By the Referee:

Q. You had lunch with Mr. Utley and what other person at the time you first met Mr. Bell?

A. Who was the attorney?

Q. Mr. Parsons? A. Yes, Mr. Parsons.

Q. Did you meet accidentally at lunch, or was it an arranged lunch?

A. There wasn't any arrangement. I think that I was up at Mr. Utley's office talking to him about the reversal in the Hamaker case, Hamaker versus Heffron, and we went down the street. I met Russell Parsons up there. I was introduced to him, and we went downstairs. And Utley says, "Let us go in and eat here." We went in and ate; and while we were at the table, Mr. Bell came through.

Q. Was there any discussion about the Church case?

A. No, your Honor, I am satisfied that there wasn't.

Q. It was not mentioned?

(Testimony of Thomas S. Tobin)

A. I think the main topic as far as Parsons was concerned was the appeal to the Supreme Court of the United States on the sedition case.

Q. Was there any discussion at that lunch about the [97] election of Trustees?

A. I don't recall any. If there was, it didn't register.

Q. All right. A. I would be willing to say—

The Referee (Interrupting): Is there anything else?

Mr. Gendel: Yes, your Honor.

Direct Examination (Continued)

By Mr. Gendel:

Q. Well, will you give us at this time your best recollection as to whether or not there was any discussion concerning the obtaining of proofs of claim or the election of Trustees?

A. My best recollection would be that there was not. I never got the least bit excited over this Christ's Church case. I knew it was going to be a headache; and I never got the least bit excited over whether we got claims or not, to tell you the truth about it.

The Referee: Is there anything else?

Mr. Gendel: No, your Honor.

The Referee: All right, step down.

Are there any other witnesses?

Mr. Gendel: Well, I don't know whether Mr. Utley is going to come up or not. On the phone I talked to Mr. Weller, not Mr. Tobin, and suggested he contact Mr. Utley and have him up here. I did not check to find out whether he was [98] coming or not. If your Honor will permit a short recess, I can call on the phone.

The Referee: I shall give you that recess; but before I do that, I notice that the only persons in the court room with respect to this matter who are officially connected, or directly connected, are Mr. Gendel; Mr. Chester, whom the Court knows to be at present associated with Mr. Gendel; and Mr. Tobin, who came in at the request of Mr. Gendel. I do not see any of the Trustees here. I should like to be informed as to whether this is a movement by the Trustees or by the attorneys. Is there any showing here that the Trustees or any of them requested anybody to have any further hearing in this matter?

Mr. Gendel: If your Honor will check the record, I think you will find a petition for a hearing signed on behalf of the Trustees by Mr. Sampsell.

The Referee: But who initiated it? Who started the thing? Did the attorneys prepare papers and submit them to the Trustees to sign, or did the Trustees instruct or ask the attorneys to do it?

Mr. Gendel: Your Honor, it would be a little difficult—

The Referee: I am frankly—Mr. Gendel and Mr. Tobin, I am amazed at the utter indifference on the part of the Trustees. After all is said and done, you gentlemen, with all due respect to you, although you are Interveners here, have no standing before this Court to come in here and sue [99] for the opportunity to do legal work. The profession may be somewhat commercialized; but it has not come to that point yet, that attor-

neys have the right to come into Bankruptcy Court and sue for the right to perform legal services. I can not understand the indifference of the Trustees. They are the ones whose rights have been violated if any wrong has been committed. I do not even see Mr. Weller here, of Craig & Weller.

Mr. Gendel: If your Honor is making what might appear in the record as a statement of fact, I think the record ought to show that there is apparently nothing that the Trustees can add by their testimony; and I believe the three of them are all busy on matters connected with Christ's Church of the Golden Rule. It is our understanding, Mr. Boteler having been present at the last hearing and having testified on behalf of the Trustees, that it is not necessary for a litigant to be present in court if his testimony is required, particularly if he is a busy man.

The Referee: That is granted. Mr. Boteler telephoned the Court ten minutes before our last hearing convened and said, "Do you want me there?"

The Referee said, "I do not want you there. You are the one that asked for it."

He said, "I am going to be rather busy; but I will try to make it."

Now I concede, Mr. Gendel, that it is not technically [100] necessary for the Trustees to be here: but if their rights have been violated and if they feel very deeply about it, that they have been deprived of the opportunity to be represented by counsel of their own

selection, I think they would be here. That is why I want an explanation as to who the real moving parties are here, whether it is the Trustees or whether it is you gentlemen who want to get a little legal business.

Mr. Gendel: Let us put it this way, your Honor, if I may answer your Honor's question; I presume it may be directed to me.

The Referee: Mr. Tobin can answer it, too, if he wants to.

Mr. Gendel: The Trustees as such have no particular personal connection with Messrs. Frank C. Weller, Thomas S. Tobin, nor Martin Gendel; nor will they be any better off financially if they happen to be the attorneys representing them than if Grainger & Hunt are the attorneys involved. So it is nothing in their pocket. The legal problem of whether or not the Court can make a ruling in chambers which by implication impugns or affects the reputation of the attorneys involved is something entirely different. In that they are deeply interested. As to the presentation of facts in a court hearing, the men are all busy men. They desire to have the matter heard and concluded. By this time I think they feel much as Messrs. Weller, Tobin, and Gendel feel, that the case has gone so far that it would be [101] a tremendous headache for a substitution to be involved. But they, nevertheless, feel that, because of the conduct of the Court in a Star Chamber session, the facts involved should be presented so that then the Court will have evidence that can be considered as it has been considered in these last hearings and, pursuant to that evidence, without considering the practical effect of a change of



attorneys, since that is not the issue before this Court, would then rule on the validity of the original petition. Now they are carrying the flag, we are doing the work. Your Honor can phrase your question in any way as to their interest in the matter. To them their interest, at this stage of the game, after approximately one year of administration, is primarily a legalistic one; and that is what are the rights of the Trustees and the counsel for whose employment they propose to ask? So that I do not think it is at all a fair question even to ask in a proceeding of this character, "Why aren't these men here?" What could they do here? The Court is fully familiar with what they could or could not testify to. Frankly I think that the Petitioners have done everything they could do to comply with the intimated desires of the Court as to testimony in addition to the affirmative testimony of Mr. Weller and Mr. Boteler as heretofore given. If your Honor wants the three gentlemen present, we shall be glad to have them here.

The Referee: I repeat I do not want anybody here. I am [102] simply drawing my own conclusions and my own inferences from the fact that they are not here.

Mr. Gendel: Well—

The Referee (Interrupting): All right, how long do you want to wait for Mr. Utley?

Mr. Gendel: I just want to call his office to see whether or not he can come here.

The Referee: All right, we shall take a short recess.  
(Recess.)

The Referee: You may proceed.

Come forward, please, Mr. Utley.

ERNEST R. UTLEY,

having been first duly sworn, testified as follows.

The Referee: Be seated, please.

Your name is Ernest R. Utley?

The Witness: Yes, sir.

The Referee: Proceed.

Direct Examination

By Mr. Gendel:

Q. You are one of the attorneys for the Bankrupt Corporation, are you? A. Yes, sir.

Q. Now, Mr. Utley, do you recall Mr. Tobin's meeting Mr. Bell in your office at any time? [103]

A. If he ever met him there, I didn't know anything about it. I do not believe Mr. Tobin was ever in my office until about two or three months ago, that is, since I have been practicing law.

Q. Do you remember an occasion when Mr. Tobin was at your office and you introduced him to Russell Parsons, one of your associates counsel?

A. I think that was the time I had in mind two or three minutes ago.

Q. On that particular occasion did you have lunch with Mr. Tobin?

A. I don't think so. We might have, I don't know.

Q. Mr. Utley—

A. (Interrupting) I don't recall it if I did.

Q. Do you recall—

A. (Interrupting) I don't recall having lunch with him. I could have had lunch with him. Did I?

Q. Mr. Utley, do you recall having lunch with Mr. Tobin and Mr. Parsons in the latter part of 1945?

A. No.

(Testimony of Ernest R. Utley)

Q. Do you recall Mr. Bell's being introduced to Mr. Tobin by you or in your presence, whether it was at lunch or in your office or any other place?

A. Not Mr. Tobin. I have in mind another matter that you may have confused. Early in this case Mr. Bell and Mr. Parsons and I were eating lunch. Senator Weller came in and [104] came up to the table, started kidding me about my Church case. I introduced him to Mr. Bell, and he was slightly embarrassed because he had been kidding about the Church case. But that was Senator Weller, not Mr. Tobin.

Q. At that time was there any conversation with Senator Weller about the election of Trustees or proofs of claim or anything of that character?

A. That was not mentioned; just an introduction, a few friendly words passed back and forth. There was nothing about the Trustees.

Q. Was there anything about the case itself; was the case itself discussed at that time?

A. Well, Senator Weller came up; and he was kidding me about having a church case. I don't know just what he said, some passing remark. It was such that when he found out Mr. Bell was sitting there with me it rather embarrassed him a little bit. I introduced him to Mr. Bell, and he turned a little red in the face when I did.

Q. Did that about terminate the conversation?

A. Oh, a word or two of greeting, a laughing remark or two passed. I don't remember what it was now.

Q. On any occasion, Mr. Utley, were you present when either Mr. Bell, or any one on his behalf or on behalf of the Bankrupt Corporation, had any conversation with Mr. Tobin concerning the obtaining of proofs

(Testimony of Ernest R. Utley)

of claim or the voting for a Trustee or the election of a Trustee? [105]

A. No, I don't recall any such; I don't recall Mr. Tobin's ever being with Mr. Bell when I was with him before the election of the Trustees.

Q. Now do you know whether or not—

A. (Interrupting) They could have been together, but I don't know anything about it.

Q. Do you know whether or not Mr. Bell or any one on behalf of Mr. Bell or the Bankrupt Corporation had any conferences or conversations with either Mr. Tobin or Senator Weller or anybody connected with the Los Angeles Credit Managers Association, formerly known as The Board of Trade, concerning the subject matter of obtaining proofs of claim or the voting for the election of a Trustee?

A. Nothing to my knowledge. I might qualify that to this extent: Of course—you say anybody on behalf of Mr. Bell. Naturally I knew that the Board of Trade had some claims that they were going to vote. I didn't know just who they were going to vote for.

The Referee Q: How did you know it?

A. How did I know they had the claims?

Q. Yes.

A. Because I think Senator Weller told me that they had some claims.

Q. Then you did have some discussion with Senator Weller about the voting of claims for Trustees?

A. Not about the voting or claims. I merely knew they [106] had claims. I didn't know whom they were going to vote for. I assumed naturally they were going



(Testimony of Ernest R. Utley)

to vote for Mr. Sampsell just as a matter of past history, what they did.

The Referee: Go ahead.

Mr. Gendel: Will you tell us whether you or any one to your knowledge had any conversation with Senator Weller or any one connected with him concerning either the subject matter of obtaining proofs or the voting of any proofs of claim in connection with the election of a Trustee?

A. I never had any conversation with Mr. Weller nor any one else did, so far as I know, concerning how they were going to vote the claims.

Q. Did you have any conversation with Senator Weller or any one on his behalf concerning the obtaining of claims?

A. Not the obtaining. I just knew that they had some. I knew that the Board of Trade—I have always called it the Board of Trade—had some claims; and, until they got up here, I didn't whether they were going to vote for one or three Trustees. I assumed naturally from my past nine years of experience on the bench that if they voted them they would vote them for Mr. Sampsell. That has been their practice all those years.

Q. You said you talked to Senator Weller on an occasion about the fact that they had some proofs of claim. What was that occasion?

A. I don't—I don't even remember where it was or when [107] it happened; but I just asked Senator Weller if they had claims in the case, I think; and he said they did have.



(Testimony of Ernest R. Utley)

Q. Was that about the substance of it?

A. Just the fact that they had some claims.

Q. Do you know whether or not the Bankrupt or Mr. Bell or anybody on behalf of Mr. Bell or the Bankrupt furnished the so-called Board of Trade or Senator Weller or Mr. Tobin with a list of creditors?

A. Not that I know anything about.

Mr. Gendel: May I have the two Certificates, please, your Honor?

(The Court hands a paper to counsel.)

Mr. Gendel Q: I do not know, Mr. Utley, whether you are familiar with the Court's Certificates on Review or the exhibits, are you? A. No, I am not.

Q. Well, I want to show you the documents we refer to, one dated December 29, 1945, on what purports to be the Hotel Stratford stationery. If you care to, go ahead and read that. (Handing a paper to the witness)

A. Is that all you want me to read?

Q. Well, here is what appears to be a similar type of letter dated December 31, 1945, also on Hotel Stratford stationery. (Handing a paper to the witness)

A. Yes.

Q. Then in the Supplement there is a form of a proof of [108] unsecured debt—let me see, yes, a printed form. There is a charge ticket to Wolcott's for blanks of proof of unsecured debt and letter of attorney. There is an original and a copy of a memorandum entitled "P36-B," and what purports to be a carbon copy of a communication dated December 28, 1945, starting with the words, "Please check with all of our Oregon cred-

(Testimony of Ernest R. Utley)

itors." Do you know anything about the sending of any of those documents or the obtaining of any of those documents?

A. Nothing whatever. I had told some one in connection with the Church case—I don't know whether it was Mr. Bell or Miss Knapp or Mrs. Huff—that creditors should be notified to file claims; if they knew any creditors they should notify them. But I never told them to send out any letters, never told them to furnish any creditors with any blanks.

Q. Mr. Utley, you will notice that the two letters first referred to, that dated December 29th and that dated December 31, 1945, refer to a L. A. Board of Trade at 704 South Spring Street?

A. This one says "Los Angeles Board of Trade."

Q. Pardon me, the Los Angeles Board of Trade I believe is correct. Do you know where Mr. Bell obtained the information for that communication, Mr. Bell or any one connected with the organization?

A. I don't have the slightest idea. [109]

The Referee: Well, Mr. Bell has testified that you told him about the Board of Trade, Mr. Utley.

The Witness: I told him that the Board of Trade would undoubtedly be voting claims.

The Referee Q: What Board of Trade did you have in mind when you told him that?

A. I had in mind the one on 7th Street.

Q. The one represented customarily by Craig & Weller?

A. Yes. I told him that because I knew the Board of Trade in a case of that kind would have claims to vote.

(Testimony of Ernest R. Utley)

Q. You told him that the Board of Trade usually voted for Paul W. Sampsell, did you not? A. Yes.

Q. You told him that Paul W. Sampsell was a good man?

A. I also told him Paul W. Sampsell, Boteler, Goggin—I named over Eddie Lynch, I named over George Gardner. I think we discussed practically every Trustee that had acted in any of the courts. And I told him that they were all good men, competent, capable men. I told him, however, that I felt that in a case of this size probably Mr. Boteler or Mr. Sampsell or Mr. Goggin were better equipped to handle it.

The Referee: Go ahead.

The Witness: And I told him he would find them all good, conscientious, capable men.

Mr. Gendel Q: Mr. Utley, when was it first called to [110] your attention, if at all, that Mr. Bell or some one on behalf of Mr. Bell or the Bankrupt organization was recommending that if a particular creditor did not have his own attorney representation was being furnished by Raphael Dechter or the Los Angeles Board of Trade in connection with those letters?

The Witness: Will you read that question?

(The reporter read the question.)

I never knew that reference was being made to the Board of Trade until I heard later about these letters' being in the file here.

Q. You mean after the Court had ruled on the disqualification; is that right? A. Yes.

Q. To your knowledge—

(Testimony of Ernest R. Utley)

A. (Interrupting) I didn't understand that Mr. Bell was necessarily opposed to the Board of Trade; but I didn't know he was out boosting for them.

Q. All right, sir. Now to your knowledge did Mr. Bell or any one on behalf of Mr. Bell and/or the Bankrupt Corporation, to make the question all inclusive, have any conversations with any one connected with Craig & Weller; Thomas Tobin; Martin Gendel; the Los Angeles Credit Managers Association, formerly known as the Board of Trade; or any one connected with any of those persons or organizations concerning the controlling of the election of the [111] Trustees or the obtaining of proofs of claim?

The Witness: Read that question.

(The reporter read the question, as follows: "Q. All right, sir. Now to your knowledge did Mr. Bell or any one on behalf of Mr. Bell and/or the Bankrupt Corporation, to make the question all inclusive, have any conversations with any one connected with Craig & Weller; Thomas Tobin; Martin Gendel; the Los Angeles Credit Managers Association, formerly known as the Board of Trade; or any one connected with any of those persons or organizations concerning the controlling of the election of the Trustees or the obtaining of proofs of claim?") A. Not to my knowledge.

Mr. Gendel: That is all, your Honor, unless you care to ask Mr. Utley any questions.

The Referee: No, I have no further questions.

Mr. Gendel: No further questions, your Honor.

The Referee: Is there any other evidence?

Mr. Gendel: No, your Honor, the Trustees rest.



(Testimony of Ernest R. Utley)

The Referee: All right, do you want to be heard?

Mr. Utley: May I be excused, your Honor?

The Referee: Surely.

(Mr. Utley leaves.)

Mr. Gendel: Well, it is rather a difficult proposition, your Honor, to be heard partially; and yet I feel that practically anything that could be said on this matter has [112] been said many times. The only thing that I would like to point out to the Court is that if the Trustees are going to be denied the attorneys of their choice, as is indicated by our Ninth Circuit Court of Appeals, that right can be exercised only in apparently the rarest cases or, let us say, in cases only where good cause appears. I think, as this Court has indicated in the past, that there is a field of discretion involved in a Referee's right to deny or grant a petition for the employment of counsel. Our Circuit Court has indicated that there should be a judicial hearing in connection with that granting or denying if that problem arises. We have now had what the Trustees consider a judicial hearing. So we would have to pass on to the second phase of the opinion of the Circuit Court of Appeals, which cites the two cases setting forth the conditions under which a petition by a Trustee can be denied. And I would like to point out once again that the Court has quoted the language stating that only in the rarest cases should the petition of the Trustees be denied. Apparently the activity of the Bankrupt, through Mr. Bell and apparently other persons associated with the Bankrupt Corporation, was an uncommunicated activity as far as Messrs. Craig & Weller and Thomas



Tobin are concerned or even the Los Angeles Credit Managers Association.

The Referee: Mr. Bell has testified he talked to Mr. Tobin. [113]

Mr. Tobin: Yes, I have heard his testimony, your Honor.

The Referee: He was your witness.

Mr. Gendel: And taking that testimony by its four corners and stretching it as far as it could possibly be stretched, in my humble opinion there is nothing there that indicates that the obtaining of proofs of claim or the election of Trustees by any one Mr. Tobin was associated with would be a controlled proceeding in the sense that the cases have heretofore required in denying the allowance of attorneys' fees or the employment of counsel by Trustees. As a matter of fact, Mr. Tobin recalls no such conversation, no such conversation as is indicated by Mr. Bell. Mr. Bell has predicted his recollection of it on an introduction by Mr. Utley; and Mr. Utley not only denies the existence of the conversation but also the introduction.

Now taking into consideration the fact that both Mr. Tobin and Mr. Utley are officers of this court and considering your Honor's experience with Mr. Bell as a witness over the past year—

The Referee (Interrupting): What do you mean by that?

Mr. Gendel: Your Honor has had occasion to see Mr. Bell in court testifying. I don't know whether that has occurred before as far as Mr. Utley and Mr. Tobin—

The Referee (Interrupting): I do not think that point is well taken, Mr. Gendel. I do not have any doubt of

Mr. [114] Bell's veracity—I mean as a general, consistent thing. I take each proceeding by itself. And when every witness has had his say, I then make my findings as to what the facts are. Those facts may directly or indirectly attribute to Mr. Bell the giving of false testimony; but I take every proceeding by itself. Mr. Bell stands here just the same as any other witness.

Mr. Gendel: I have reference to—

The Referee (Interrupting): And in any event you called him.

Mr. Gendel: Certainly, at the indication of the Court.

The Referee: I want no more reference, Mr. Gendel, to the indication of the Court. You are here for a hearing. You have been given an opportunity for a hearing. The Court has not required you to produce anybody.

Mr. Gendel: No, but the Court indicated at the last hearing at which evidence was introduced that unless—and this, if I recall correctly, from the bench—that unless evidence was introduced as to why the letters were sent out the Court was going to reaffirm the denial of the Petition for Employment. So that of course left no alternative to the Petitioners.

The Referee: I did not tell you whom you should call.

Mr. Gendel: Well, Judge—

The Referee (Interrupting): Go ahead with your argument.

Mr. Gendel: This matter is to me too serious a matter [115] to quibble on words. You did not mention Mr. Bell or anybody specifically. You merely said you wanted to know why the letters were sent out. The conclusion as to whom you wanted to hear from was rather inescapable. The record will speak for itself on that.

Mr. Bell has testified on apparently what the Court was interested in. If your Honor cares to believe Mr. Bell and not to follow the general basic rule of law, which is that a Court has a right to disbelieve a witness in one matter, having found he has no basis for belief in other matters—this is a continuous proceeding, a single case—if the Court decides to disregard that basic rule of law, nevertheless, taking Mr. Bell's testimony, I think he made himself rather clear that if he had a conversation with Mr. Tobin that conversation was predicated on a statement of his position, that he wanted a Trustee who was not political minded or connected with the Attorney General, not prejudiced from a religious standpoint, and who would give an expeditious administration to the estate. I think that is just about as far as you can stretch his testimony. He denied having discussed in any way the control of the election of a Trustee or the conduct of the Trustee after election; said, if I recall correctly, your Honor, that he did not even consider that as a problem because he did not anticipate what ultimately developed in the administration of this estate. Now that is the extent of Mr. Bell's testimony. He could not recall Mr. Tobin; so [116] he described the gentleman—responded that he did not remember what was said except that he felt it must have been to his satisfaction as far as he was concerned.

Now what does that mean? Does that mean that some one was going to be elected or that attorneys were going to be employed by that some one who would be subject to disqualification because of this conversation? I do not think so, your Honor. I think that if your Honor is going to affirm the disqualification, it would have to be on the basis that if a Bankrupt, directly or indirectly,

at any time, should recommend the placement of claims, even though that recommendation was not effective (I do not think there is anything in the record to indicate that these forms that are in the Supplemental Certificate were ever voted at the election of Trustees), then that indication would disqualify the proposed persons elected as Trustees or to be nominated, let us say, as Trustees or any one to be appointed by those proposed persons.

The thought I have in mind is this, without going into the legal authorities involved because I feel that your Honor, having read the ruling in the Circuit Court of Appeals, is familiar with those basic authorities, that you would have first the basic problem was there a controlled proceeding in the sense that the Bankrupt or any one on the Bankrupt's behalf was able to direct or participate in the election of the Trustees? I think then your Honor's problem [117] would be the fact that these recommendations and the testimony of Mr. Bell and the exhibits that are now before the Court indicate clearly that if the desires of the Bankrupt were carried out, the Los Angeles Board of Trade, at 704 South Spring Street, would have received claims in a matter which they knew nothing about. And it would be their names that would be named in the proof of claim. I think that that basic, beginning point, your Honor, can not be neglected in building up the conclusion that has to be reached by this Court. In other words, if there was a scheme and a device and a plan in the mind of the Bankrupt which in any way could be connected with the Trustee or counsel proposed by the Trustee, it should be that type of a scheme which, to some extent at least, was attempted to be carried out. And the point I am trying to make in connection with that factual situation is that, if Mr.



Bell had been effective in his desire, he would have had those claims going to an organization which did not exist. And if your Honor is taking into consideration his intentions or his desires, transmitted by telephone or personally, prior to the mailing of the letters, which we have exhibits of in this court in your Honor's Certificate and Supplementary Certificate, then your Honor must conclude that it would be the Los Angeles Board of Trade that would have received those proofs of claim. And there is no evidence whatsoever that the Los Angeles Board of Trade voted claims in this proceeding. So [118] I think you have to start from that basic premise first, that nothing was accomplished by the Bankrupt by assuming that the Bankrupt, through Mr. Bell, had a desire to attempt to control the election of Trustees.

The second problem is that those claims, if they had been in existence, and of course the record indicates they were not, would have been voted for men who obviously, apparently, knew nothing about the so-called participation by the Bankrupt, Messrs. McKee, Boteler, and Sampsell. They are not disqualified, because the Court recognizes their record as officers of the court and Trustees and Receivers in years past—except for Mr. McKee, who came highly recommended to the Court apparently. They would be the ones disqualified, because they are the ones for whom the claims would have been voted. Then your Honor would have to overcome that particular hurdle and get over to the attorneys presented by the Trustees in their Petition for Employment.

Now I do not think that you can stretch any intention on the part of Mr. Bell or the Bankrupt Corporation to control the Trustees or counsel for the Trustees by the communications which had been forwarded by the



organization. No. 1, they were ineffective; No. 2, they did not occur. I do not think, then, that this Court could exercise its discretion and say, "There was enough evidence before me which, if admissible evidence, would justify my finding that the Bankrupt could control the Trustees or counsel for the Trustees [119] through his participation in the attempt to obtain claims and to vote them for the Trustees."

I realize that your Honor has indicated that the disqualification order was not directed at the particular attorneys involved. Nevertheless, no matter what is said in the written record, the ultimate result of the disqualification is to indicate, by implication or inference, that the sworn affidavit or verification was not sufficient to overcome the feeling of the Court that there was some control connection. Now the expression of your Honor in the Order of January 2, 1946, that because of the circumstances existing there might be a suspicion cast some day by some one on the administration of the Bankruptcy Court to the effect that Mr. Bell or some one on behalf of the Bankrupt Corporation was attempting to control or had controlled the Trustees or the attorneys for the Trustees, is a suspicion that can not be based on evidentiary matters introduced in this proceeding, because there was nothing, in my opinion, to justify that suspicion. Now your Honor may still have that suspicion that some day somebody might complain. But I think the Circuit Court of Appeals has indicated without question that as far as the Circuit Court in this District is concerned the right of the Trustees to select their own counsel need not, or can not—let us put it that way—be predicated on mere suspicion; that there has to be something much stronger than that.

And of course the position we have [120] taken on the review of the original orders was that the Trustees have a basic right to the selection of their counsel unless there is judicial evidence, pursuant to a judicial hearing, introduced that this Court does not have the right to exercise its discretion.

The Referee: Well, Mr. Gendel, I go back again to the utter indifference of the Trustees in this proceeding. I can not bring myself to feel that they are in any way aggrieved by any order the Court has heretofore made depriving them of their right to certain attorneys as their counsel. That leaves the Court with only one impression, that the sole desire of the Trustees here is to repay these attorneys for service the attorneys rendered to the Trustees in nominating them for the office of Trustee. In other words, the Trustees stand before the Court here and say, "You can not deprive us of the right of distributing patronage. We have that right, we are the Trustees. Because we are the Trustees, we ought to have the right to pass out this position of attorney for the Trustees."

Now we should all, I think, be rather shocked if the Trustees stood before this Court and said, "We are very grateful to Craig & Weller and Martin Gendel and Mr. Tobin for electing us Trustees, and therefore we are paying these gentlemen the sum of \$5,000." I do not see at the moment, without having an opportunity to study it, why perhaps it might not be wrong. I do not know whether it would be [121] criminal or not, I do not know whether it would be unethical or not; but I think we should all be rather instinctively shocked by it. And yet what is the distribution of patronage by Trustees except the payment for something that was done for

them, the Trustees? So, Mr. Gendel, one is not impressed in this situation with the right of the Trustees to pick their own counsel. If Mr. Sampsell were here and Mr. Boteler were here and Mr. McKee were here,—if any one of them were here and if he were to say, “Your Honor, I have a particular confidence in Mr. Weller or in Mr. Gendel or in Mr. Tobin; I have been represented by these gentlemen or by one or more of them all down through the years, and I just do not feel safe with anybody else”—now if that were the situation, then the Court certainly would be impressed with the right of any fiduciary, Trustee in Bankruptcy or otherwise, in the discharge of complicated duties and in the performance of responsibilities that are very difficult—the Court would be impressed with the right of the fiduciary to select counsel that he had confidence in. But all of that is absent in this case. Here it seems it is just a cold blooded proposition: “We want to distribute the patronage that goes with the office.”

However, it is true, as Mr. Gendel points out, that the Court may not deny the right of Trustees to employ counsel of their own selection without a good reason. I think it comes down to the general order relating to the employment [122] of counsel or officers of the Bankruptcy Court. The Court must make a finding that the counsel proposed do not represent any adverse interests, and that their employment is for the best interests of the estate. So the one, the first is a clearcut question or finding of fact: Do these attorneys represent any

adverse interest? There is no possible discretion there. That is purely a finding of fact. The other phase of it, though it is ultimately a finding of fact, may involve some discretion: Is the employment of the proposed attorneys in the best interests of the estate?

Now, Mr. Gendel, this is an important matter for everybody. I ruled on it once. But the matter is before me again. Evidence has been offered here. I deem it my duty to give this the most thorough consideration; and so that I may not have overlooked anything, I shall ask Mr. Clay, the reporter, to furnish me with a transcript of this afternoon's proceedings so that I may study it over. I think the testimony at the previous hearing is rather clear in our minds.

Mr. Gendel: Your Honor, I take this matter, as the Court has indicated it does, in sincerity and seriousness. I think it is more or less of a milestone in at least local bankruptcy administration. I would like to offer at this time, if the Court does not want to penalize the estate with the expense, to provide the Court with a transcript of the [123] first hearing also so that the Court may have a complete picture of the testimony in line with the authorities that have been submitted to the Court and the arguments that have been presented. Frankly, I am trying to refrain from arguing as if before a jury, because I know that your Honor is considering this matter with all the judicial fairness that your Honor can give it. I think, as I have indicated in the arguments presented to the Appellate Court, that perhaps your Honor



got off onto the wrong foot legally; and I am hoping to get your Honor onto the right foot. I do not want to allow any possibility of any factual forgetfulness or any of the human element to get into it, because we do not enjoy going back up the ladder again.

The Referee: You may do that.

Mr. Gendel: I shall do that, and I shall want a copy provided at the same time of the transcript your Honor has ordered.

The Referee: Very well.

The matter is submitted.

[Endorsed]. Filed Jan. 21, 1947. [124]

[Endorsed]: No. 11735. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of Christ's Church of the Golden Rule, a non-profit California corporation, Bankrupt, Paul W. Sampsell, L. Boteler and McIntyre Faries, as successor to Stewart McKee, the duly qualified and acting trustees in bankruptcy of the estate of Christ's Church of the Golden Rule, a non-profit California corporation, bankrupt and Frank C. Weller, Thomas S. Tobin and Martin Gendel, Appellants. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed September 23, 1947.

PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of Appeals for  
the Ninth Circuit.



In the United States Circuit Court of Appeals  
in and for the Ninth Circuit

No. 11735

In the Matter of

CHRIST CHURCH OF THE GOLDEN RULE,  
a non-profit California Corporation,

Bankrupt.

CONCISE STATEMENT ON APPEAL AND DESIGNATION OF RECORD NECESSARY FOR CONSIDERATION THEREOF AND TO BE PRINTED.

To the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth *District*:

For their concise statement of points on appeal on which the appellants intend to rely, the appellants, and each of them, adopt the statement of points filed with the Clerk of the District Court of the United States, Southern District of California, Central Division.

The appellants do hereby designate and adopt the statement of points as their assignments of errors.

The appellants do hereby designate the entire certified transcript as the record necessary for consideration thereof and to be printed.

Dated this 1st day of October, 1947.

FRANK C. WELLER

THOMAS S. TOBIN and

MARTIN GENDEL

By Martin Gendel

Attorneys for Appellants

[Endorsed]: Filed Oct. 3, 1947. Paul P. O'Brien,  
Clerk.



No. 11735

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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In the Matter of

CHRIST'S CHURCH OF THE GOLDEN RULE, a nonprofit  
California corporation,

*Bankrupt,*

*vs.*

PAUL W. SAMPSELL, L. BOTELER and McINTYRE FARIES  
(as successor to Stewart McKee), the duly qualified and  
acting trustees in bankruptcy of the estate of Christ's  
Church of the Golden Rule, a nonprofit California cor-  
poration, bankrupt, and FRANK C. WELLER, THOMAS  
S. TOBIN, and MARTIN GENDEL,

*Appellants.*

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## APPELLANTS' OPENING BRIEF.

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FRANK C. WELLER,

THOMAS S. TOBIN,

111 West Seventh Street, Los Angeles 14,

MARTIN GENDEL,

607 James Oviatt Building, Los Angeles 14,

*Attorneys for Appellants.*



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No. 11735

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

---

In the Matter of

CHRIST'S CHURCH OF THE GOLDEN RULE, a nonprofit  
California corporation,

*Bankrupt,*

*vs.*

PAUL W. SAMPSELL, L. BOTELER and McINTYRE FARIES  
(as successor to Stewart McKee), the duly qualified and  
acting trustees in bankruptcy of the estate of Christ's  
Church of the Golden Rule, a nonprofit California cor-  
poration, bankrupt, and FRANK C. WELLER, THOMAS  
S. TOBIN, and MARTIN GENDEL,

*Appellants.*

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## APPELLANTS' OPENING BRIEF.\*

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### I.

#### Jurisdictional Statements.

##### A. The District Court Had Jurisdiction of This Cause.

As a court of bankruptcy, the District Court of the  
United States had jurisdiction of this cause pursuant to

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\*To distinguish between the Transcript of Record in Appeal No. 11370 (incorporated herein by reference through the permission and order of the Court made on the 22nd day of August, 1947), and the Transcript of Record in the instant appeal we shall designate the first Transcript in No. 11370 as: "Old Tr."

the acts of July 1, 1898. Chapter 541, Secs. 1 and 2, 30 Stat. 544, 545, as amended; 11 U. S. C. A. (Supp.), Secs. 1 and 2 (1943). . On November 1, 1945, the bankrupt filed a petition under Chapter XI of the Bankruptcy Act, in this proceeding. On November 15, 1945, the bankrupt filed a request for adjudication in the Chapter XI proceeding, and on the same day, it filed, in the same proceedings, its voluntary petition in bankruptcy [Old Tr. p. 2]. On November 19, 1945, Hon. William C. Mathes, Judge of the District Court, dismissed the bankrupt's plan of arrangement under its Chapter XI petition, and adjudged it a bankrupt [Old Tr. p. 4]. Thereafter, the matter was duly referred to Referee Benno M. Brink, as the referee in the within proceedings [Old Tr. p. 4]. On December 4, 1945, the first meeting of creditors was held before this referee and this meeting was continued to January 2 and 3, 1946; on January 3, 1946, Messrs. Paul W. Sampsell, L. Boteler and Stewart McKee were duly elected by the majority of the voting creditors in both number and amount, and they qualified as the trustees in this proceeding. On January 11, 1946, the said trustees presented to the referee their formal petition for leave to employ Frank C. Weller of Craig and Weller, Thomas S. Tobin, Martin Gendel and Irving M. Walker as the attorneys for the trustees [Old Tr. pp. 9-12]. By orders dated January 14 [Old Tr. pp. 13-14], and January 22, 1946, the referee granted the application of said trustees as to Irving M. Walker, but denied the application as to the remaining proposed counsel. The primary order



from which the original review to the District Judge was taken is the order of the referee dated January 22, 1946 [Old Tr. pp. 20-35].

Within ten days after the entry of the referee's order the appellants herein, Frank C. Weller, Thomas S. Tobin and Martin Gendel were allowed by order of the District Judge to intervene and be parties to the appeal from the said order [Old Tr. p. 66]; thereafter the trustees and said interveners, as appellants herein, filed their petition for review by the District Judge (Act of July 1, 1898, Chapter 541, Sec. 39(a); 30 Stat. 555, as amended; 11 U. S. C. A. Sec. 67, subd. a (1943) [Old Tr. pp. 36-41]. The matter was argued on February 20, 1946, and Hon. William C. Mathes, as District Judge, ultimately made an order on May 13, 1946, which order was entered in the Civil Order Book at page 4 on said date, and docketed therein on the same day; said order confirmed the previous orders of the referee as described above [Old Tr. pp. 69-75].

An appeal was taken to this Honorable Court from the aforesaid order of the District Judge affirming the order of the Referee, and this Court, in Civil Appeal No. 11370, by opinion filed on the 15th day of November, 1946,<sup>1</sup> reversed the order of the District Judge and remanded the matter for further proceedings; thereupon,

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<sup>1</sup>For convenience, we have set forth in the Appendix to this brief a copy of the opinion of this Court in Civ. App. No. 11370. [See Appendix.]

the appellants, Paul W. Sampsell, L. Boteler and Stewart McKee, filed a verified petition, dated the 10th day of December, 1946, requesting the Referee in Bankruptcy to grant a court hearing as directed by this Honorable Court on the original petition for the employment of Frank C. Weller, Thomas S. Tobin and Martin Gendel as their permanent counsel, said petition having been filed on the 11th day of January, 1946 [Tr. pp. 24-25].

Thereafter, the Referee in Bankruptcy conducted hearings upon the aforesaid petitions and made his Findings of Fact and Conclusions of Law and Order thereon upon the 12th day of February, 1947, again denying the original petition of the trustees for leave to employ appellants Frank C. Weller, Thomas S. Tobin and Martin Gendel. [Tr. pp. 28-37.]

Within the time allowed by law, the appellants herein, Paul W. Sampsell, L. Boteler, Stewart McKee, Frank C. Weller, Thomas S. Tobin and Martin Gendel, filed a petition for review [Tr. pp. 37-42] of the Referee's order denying the right of said trustees to employ the aforementioned counsel, and the matter was again argued before the Honorable William C. Mathes, as District Judge, on the 24th day of March, 1947; the petition for review was taken under submission by said District Judge and was not decided until an order was made by him on July 11, 1947, on the petition for review of the Referee's order of February 12, 1947; said order, in effect, vacated and set aside the findings of fact and conclusions of law contained in the Referee's order and recommitted to the Referee, with directions, the original petition of the trustees (appellants) for leave to employ the attorneys (likewise appellants herein) named therein. [Tr. pp. 44-49.]

**B. The Circuit Court of Appeals Has Jurisdiction of  
This Appeal.**

Within the time allowed by law, your appellants filed a notice of appeal [Tr. p. 50] and have taken the steps required by law, presenting the necessary record on the within appeal.

The jurisdiction of the Circuit Court of Appeals is invoked pursuant to Secs. 24 and 25 of the Bankruptcy Act (Act of July 1, 1898, Chapter 541, Secs. 24 and 25; 30 Stat. 553 as amended; 11 U. S. C. A. (Supp.) Secs. 47 and 48 (1943).) Appellate jurisdiction over this proceeding in bankruptcy vested in the Circuit Court of Appeals upon the filing on August 19, 1947, of the notice of appeal, the amount involved being in excess of \$500.00, and the appeal being taken by the trustees in bankruptcy.

**II.**

**Statement of the Case.**

This appeal is from the order of the District Court entitled "Order of Judge on Petition for Review of Referee's Order of February 12, 1947," dated and entered on July 11, 1946. [Tr. pp. 44-49]. This order in turn vacated and set aside the findings of fact and conclusions of law and order of the Referee in Bankruptcy dated February 12, 1947 [Tr. pp. 28-37], and recommitted to the Referee the original petition of appellants herein, filed on January 11, 1946, with directions. The Court's hearing on the petition of the trustees in bankruptcy, who are appellants herein, filed by them on January 11, 1946, for the employment of Messrs. Weller, Tobin and Gendel, as their counsel, was granted by the Referee only after this Honorable Court had considered the evidence and heard the

arguments presented before this Court reversing the original *ex parte* orders of the same District Judge and Referee; this judgment was made and entered in proceeding No. 11370 and reported at 157 F. (2d) 910. (See Appendix.)

The facts and the record involved in the original appeal to this Court in the aforementioned proceeding, and numbered 11370, are before this Court pursuant to an order made by this Court on the 22nd day of August, 1947, permitting the incorporation of the transcript of record in the original proceeding to be before this Court by reference without reprinting. Appellants further respectfully urge that this Court consider the matters set forth in the appellants' opening brief in the original proceeding, as if the same were set forth verbatim in the within brief.

Originally, the Referee in Bankruptcy, without granting a court hearing, made an unsubstantiated *ex parte* order, in chambers, denying the verified petition of the trustees to employ certain counsel, all of whom are now appellants in the within proceeding. The District Judge approved this conduct and order of the Referee. This Honorable Court reversed the orders of the Referee and the District Judge on the basis that only in the rarest cases, after proper judicial deliberations in open court and the presentation of admissible and binding evidence, could a Referee in Bankruptcy deny an otherwise proper petition by trustees for employment of counsel of their own choice. Thereupon, your appellants sought to have a hearing in open court before the Referee in Bankruptcy at the earliest possible date, pursuant to the original verified petition for leave to employ counsel, filed on January 11,



1946. [Tr. pp. 24-25.] Hearings were held before the Referee and evidence was presented by your appellants on all subject matters to which the Referee in Bankruptcy directed the attention of the appellants; thereafter, the Referee in Bankruptcy made his findings of fact, conclusions of law, and again ordered that the original petition for leave to employ counsel be denied. [Tr. pp. 28-37.] An analysis of the alleged findings of fact (which we accept at face value for the purposes of this appeal), indicates no recognition of the rules of law laid down by this Court in proceeding No. 11370 governing denials of petitions for leave to employ counsel by trustees. After the Referee expressly finds that counsel proposed by the appellant trustees have no adverse interest to the estate, then, contrary to the rules of law laid down by this Honorable Court, the Referee determined that although not disqualified personally by any acts or conduct of the attorneys, some day some one, might suspect the Bankruptcy Court of making an improper order, and, predicated upon this fear, the original petition was denied.

A petition for review was duly filed before the District Judge [Tr. pp. 37-42], whereupon the matter was argued and presented to the District Judge on the 24th day of March, 1947. The matter was then taken under submission and an order, as heretofore described, was finally made by the District Judge on the 11th day of July, 1947. [Tr. pp. 44-49.]

In order to fully familiarize the District Judge with the completeness of the investigation and hearings held before the Referee in Bankruptcy, appellants provided the Court with a transcript of all oral testimony [Tr. pp. 60-162], as well as the exhibit record of all exhibits intro-



duced at the hearing. The appellants likewise respectfully pointed out to the District Judge that time was of the essence, for the reason that many complicated and complex legal matters had arisen in the conduct of the administration of the estate, and the trustees were desirous of being entitled to the use of the permanent counsel for the employment of whom they had originally filed their petition on January 11, 1946. The District Judge, in spite of having a complete transcript and record of the proceedings before the Referee in Bankruptcy, which transcript clearly answered the many inquiries made by him in his order of July 11, 1947, directed the Referee to hold further hearings and to make findings of fact and conclusions of law and an order on the same. We respectfully submit that the employment of counsel by a trustee in bankruptcy, involving a "live administration" affecting over a million dollars worth of assets, is certainly entitled to presentation to the Court and determination by the Court in as expeditious a manner as can be reasonably anticipated. Here we find the trustees in this complicated and sizeable estate, having filed a petition for the counsel of their choice on January 11, 1946, are still battling for recognition before the District Judge in July, 1947. Judicial wisdom, coated with a recognition of the pragmatic problems of such a bankruptcy administration, would have justified one of several courses of conduct by the District Judge:

Either reverse the Referee if his findings of fact were not sufficient to sustain his conclusions of law and order; or else, the District Judge should have made his own findings of fact and conclusions of law from the evidence theretofore submitted to the Referee, or he should

have taken such additional evidence as he deemed necessary to justify the District Court in making such other or further findings of fact and conclusions of law.<sup>2</sup>

There must be a reasonable termination to litigation of this character, particularly since it involves a continuing administration of substantial assets.<sup>3</sup>

We respectfully submit that an examination of the transcript of the testimony and of the exhibits presented before the Referee in Bankruptcy could leave no room for any reasonable judicial conclusion that the evidence to date, or any further investigation, would reveal that there could be any "good reason" or that this was one of those "rare cases" justifying the denial by the Referee or the District Judge of the petition for leave to employ.

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<sup>2</sup>Authority for the power of the District Court is found in the Bankruptcy Act, the Rules of Court, and is illustrated by analogous and extreme cases, referring to the "*sua sponte*" authority of the Court, such as:

*Woodruff v. Heiser* (C. C. A. 10th, 1945), 150 F. (2d) 867;

*In the Matter of A. Roth Co., Inc.* (C. C. A. 7th, 1942), 128 F. (2d) 428, 49 A. B. R. (N. S.) 453;

*Biggs v. Mays* (C. C. A. 8th, 1942), 125 F. (2d) 693, 48 A. B. R. (N. S.) 716.

Section 24 of the Bankruptcy Act appears to clearly invest this Honorable Circuit Court with full jurisdiction to revise and reverse the Referee and District Judge both as to matters of law and matters of fact. Anticipating that the query may arise as to whether or not the District Court had discretion to recommit the matter to the Referee, we respectfully submit that under all of the facts and circumstances before the District Court, the said Court should have finally determined the issues involved, without brooking further delay by recommitting the matter to the Referee.

<sup>3</sup>*Blue v. Herkmier Nat. Bk.* (C. C. A. 7, 1929), 30 F. (2d) 256 at 260: ". . . Of all classes of cases pending in the courts, bankruptcy proceedings are the last which should be delayed. To do so is a great injustice to creditors. Such delays foster just criticism and bring disrespect for the administration of justice."

Even accepting all of the findings of fact of the Referee, at face value, and without making any reference to the evidence upon which these findings were predicated (which evidence did not sustain any conclusions of fear of criticism on the part of the Referee) it is clearly evident that an application of the rules of law as laid down by this Court in the first appeal would unquestionably have required the District Judge to reverse the order of the Referee, and, predicated upon the very findings signed by the Referee, the original petition for leave to employ counsel should have been granted.<sup>4</sup>

### III.

#### Specifications of Error.

The appellants rely upon the following specifications of error:

1. The "Order of the Judge on Petition for Review of Referee's Order [Tr. pp. 44-49] for leave to employ certain counsel, is erroneous in that there were no facts before the Referee or the District Judge which would in anywise justify the exercise of any possible judicial discretion to deny to the trustees in the within bankruptcy proceeding the right to employ qualified counsel of their own choice, where employment of counsel by said trustees was proper.

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<sup>4</sup>Before proceeding with the brief, we respectfully call the attention of this Court to the fact that Mr. Stewart McKee, one of the original appellants, resigned as a trustee, and his position was taken by Mr. McIntyre Faries, and Mr. Faries, as successor to Mr. McKee, has joined in the within appeal.

2. Said order is erroneous in that a referee in bankruptcy has no right to refuse to authorize trustees in bankruptcy to employ qualified counsel of their own choice when employment by said trustees is otherwise proper, unless facts, recognizable at a judicial hearing showing grave disqualifications of such counsel, and limited only to the rarest cases, are presented to the referee and are properly findings of fact in support of such an order.

3. That the order of the District Judge from which the within review is taken is erroneous for the reason that the matters involved before the District Judge and the Referee unreasonably delay the expressed desire of the trustees in the instant bankruptcy case to employ and use the counsel of their original choice, as reflected by their petition of January 11, 1946, rather than to continue to be compelled to use interim counsel; admittedly the administration of the instant case, from its inception, has required active and vigorous participation by the attorneys for the trustees; in view of the fact that considerable delay had been incurred by reason of the appellants being required to take the first appeal in this matter to this Honorable Court, and that further delay had been incurred by reason of the necessity for the hearing occasioned by the order of this Honorable Court (Appeal of *Sampsell et al.*, C. C. A. 9th, 1946 (157 F. (2d) 910)) in reversing the original orders of the Referee and District Judge in this matter, it would appear that said District Judge could have conducted such judicial



deliberations in the form of hearing further evidence if he deemed it necessary to enlarge upon the findings of fact as theretofore submitted to him by the Referee in Bankruptcy, rather than to re-refer the matters of inquiry to the Referee. It is the position of the appellants, predicated upon the evidence and the findings of fact submitted by the Referee in Bankruptcy in support of his order of February 12, 1947, that the sole judicial discretion exercisable by the District Judge was, and is, to grant the petition for review by appellants, and to reverse the order of the Referee.

4. That the order of the District Judge of July 11, 1947, was erroneous for the reason that it failed to contain therein findings of fact and conclusions of law supporting the position of the District Judge in refusing to grant the petition on review of the trustees and reversing the order of the Referee dated February 12, 1947.

5. That the order of the District Judge dated July 11, 1947, was erroneous in that it not only disregarded the law of the case, binding the aforesaid District Court and the Referee in Bankruptcy, created by virtue of the judgment of this Court made and entered in the appeal of *Sampsell, etc.* (C. C. A. 9th, 1946), 157 F. (2d) 910, but, also, that as to all pertinent inquiries which could concern the order made by the Referee on February 12, 1947, the aforesaid District Judge had before him all of the evidence and the findings of fact of the said Referee, which evidence and findings of fact unequivocally



demonstrated that this was not a case in which the Referee could exercise his judicial discretion and deny the appointment of counsel as requested by the trustees in their original petition filed January 11, 1946 [Old Tr. pp. 12-19]; that the aforesaid order of the District Judge dated July 11, 1947, is erroneous for the reason that the 21 items, to which the said Court directs the attention of the Referee in Bankruptcy, under subdivision 3 of said order are either covered in the evidence and findings of fact as submitted to the aforesaid District Judge, or are not matters which are properly to be considered by the Referee or District Judge in adjudging the original petition for leave to employ counsel as filed by the trustees in this proceeding. As an example of the statement of this point on appeal, your appellants respectfully direct the attention of this court to item No. 3-a contained in the order of the District Judge [Tr. p. 45]; in answer to this inquiry of the District Judge, the aforesaid Judge had before him a written and verified petition [Tr. pp. 24-25] for hearing signed by the trustees in bankruptcy requesting the Referee to grant their original petition of January 11, 1946, and filed with the Referee after this Honorable Court had reversed the order of May 13, 1946, made and entered by this District Judge; in addition thereto, the District Judge had before him the petition for review [Tr. pp. 37-42], likewise verified by the trustees in bankruptcy; how can the District Judge, with propriety, inquire as to whether or not the trustees ask that their petition filed January 11, 1946, be granted?

In subdivision 3-b [Tr. p. 45] of the July 11, 1947, order, the District Judge questions whether or not the verified petition of the trustees qualifies with the requirements of General Order 44, and this inquiry is made directly in the face of the judgment of this Court entered in the appeal of *Sampsell, et al* (C. C. A. 9th, 1946), 157 F. (2d) 910, wherein this Honorable Court stated as follows (see Appendix):

“ . . . Every requirement of General Order 44 is fully satisfied by the allegations of the petition . . . ”

As a further example of the errors of the District Judge, we find, in paragraph “f” of subdivision 3 [Tr. p. 46], that the District Judge desires the Referee to make a finding as to whether or not the bankrupt is the *alter ego* of Arthur L. Bell. In view of the fact that the appellants have not challenged the finding of the Referee to the effect that Arthur L. Bell controlled and directed the bankrupt corporation [Tr. p. 30], how can we possibly be concerned with a collateral determination of a matter which might take many weeks of evidence to determine?

6. Said order is erroneous in that it deprives the trustees in bankruptcy of the right to select counsel of their own choice and it deprives the appellants in intervention of the right to follow their profession, all without due process of law, and because of the lower courts' undue and unjustifiable delay in the determination of the original petition for leave to employ counsel by the trustee.

IV.

SUMMARY OF THE ARGUMENT.

A. THE ORDER OF THE REFEREE DENYING THE PETITION OF THE TRUSTEES TO EMPLOY COUNSEL, AND THE ORDER OF THE JUDGE RECOMMITTING THE MATTER TO THE REFEREE FOR FURTHER FINDINGS OF FACT AND CONCLUSIONS OF LAW, SHOULD BE REVERSED BECAUSE THERE WAS NO GOOD REASON FOR EITHER OF SAID ORDERS AND THE MAKING THEREOF CONSTITUTED ABUSES OF JUDICIAL DISCRETION, WHICH DISCRETION, AS INVOLVED IN THE INSTANT MATTER, IS TO BE EXERCISED ONLY IN THE RAREST CASES.

B. THE ORDER OF THE DISTRICT JUDGE RECOMMITTING THE MATTER TO THE REFEREE IS IN ERROR BECAUSE IT FAILS TO GIVE ANY RECOGNITION TO THE FUNDAMENTAL RULES OF LAW LAID DOWN BY THIS COURT IN THE PRIOR APPEAL, NO. 11370.

C. THERE ARE MANY AUTHORITIES SUSTAINING THE CONTENTION THAT NOT ALL PARTICIPATION BY A BANKRUPT OR HIS COUNSEL IS FORBIDDEN. IT IS ONLY OBJECTIONABLE WHEN THE BANKRUPT ATTEMPTS TO CONTROL THE ELECTION OF TRUSTEES OR SELECTION OF COUNSEL FOR HIS OWN SELFISH AND ADVERSE INTERESTS.

D. A BANKRUPT WRONGFULLY DESIRING TO ELIMINATE CERTAIN AGENCIES OR ATTORNEYS FROM PARTICIPATING IN THE ADMINISTRATION OF AN ESTATE COULD TAKE ADVANTAGE OF THE TYPE OF RULING ISSUED BY THE REFEREE HEREIN AND BAR SUCH AGENCIES OR COUNSEL BY MERELY SENDING OUT A BLANKET LETTER OF RECOMMENDATION. THE COURT MUST GO FURTHER AND FIND A CONSPIRACY, OR AT LEAST KNOWLEDGE OF THE RECOMMENDATION, PLUS A SELFISH INTEREST ON BEHALF OF THE BANKRUPT.

E. IN THE EVENT THAT THIS COURT WERE TO SUSTAIN THE RULING OF THE COURTS BELOW, IT WOULD ESTABLISH A POSSIBLE PRECEDENT FOR SOME REFEREE IN THE FUTURE TO USE THE REASONING OF THE ORDER OF FEBRUARY 12, 1947, AS A PREMISE FOR PROMOTING SELFISH INTERESTS; AFTER ALL, THE CONJURING UP OF A GHOST SUCH AS THE FACT THAT THERE MIGHT BE SOME UNWARRANTED SUSPICION OF THE BANKRUPTCY COURT IN THE FUTURE WOULD NOT NECESSITATE THE EXERCISE OF TOO MUCH IMAGINATION; THEREBY, THE REFEREE COULD DISQUALIFY COUNSEL AND BY INDIRECTION COULD OBTAIN THE EMPLOYMENT OF COUNSEL OF HIS OWN CHOICE. (AS HAS BEEN INDICATED BY THE THREAT OF THE EXERCISE OF A PRESIDENTIAL VETO, VERY OFTEN CONGRESS WILL PASS AN ENACTMENT MORE IN ACCORD WITH THE PRESIDENT'S VIEWS THAN IF HE HAD NOT EXERCISED THIS THREAT.)

F. IF THE COURTS BELOW INTENDED TO CRITICIZE SOLICITATION OF CLAIMS BY THE TRADE AGENCY DESCRIBED AS THE BOARD OF TRADE, THEY WOULD BE DOING SO CONTRARY TO THE UNDISPUTED WEIGHT OF AUTHORITY.



V.

ARGUMENT.

A. The Order of the Referee Denying the Petition of the Trustees to Employ Counsel, and the Order of the Judge Recommitting the Matter to the Referee for Further Findings of Fact and Conclusions of Law, Should Be Reversed Because There Was No Good Reason for Either of Said Orders and the Making Thereof Constituted Abuses of Judicial Discretion, Which Discretion, as Involved in the Instant Matter, Is to Be Exercised Only in the Rarest Cases.

An analysis of the findings of fact made by the Referee, as part of his order of February 12, 1947 [Tr. pp. 30-36], compels the reversal of the said order and the making of proper conclusions of law and an order by this Honorable Court granting the original petition of the trustees filed January 11, 1946—all pursuant to the provisions of Section 24 of the Bankruptcy Act. Subdivision “a” thereof gives appellate jurisdiction to this Honorable Court in either interlocutory or final proceedings in bankruptcy, and the right to either revise or reverse in both matters of law and matters of fact. To promote the ends of justice, this authority must be exercised by this Honorable Court in the instant proceeding.<sup>5</sup>

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<sup>5</sup>Comment on an analogous situation is found in the matter of *Central Railroad Co. of New Jersey* (C. C. A. 3rd. 1947), 163 F. (2d) 44. We find, commencing at page 53 of the opinion, a discussion of the discretion of the Bankruptcy Court, and the court therein points out, as far as the authority and duty of the Circuit Court of Appeals is concerned, as follows:

“ . . . The scope of this court’s determination of such law is broad. 28 U. S. C. 225 (c) ; 11 U. S. C. 47. An appellate court may go behind discretion to ascertain correct legal stand-



(1) What was Bell's accepted purpose in recommending to creditors that if they didn't have their own attorneys—they should give their claims to the Board of Trade or to Raphael Dechter (now deceased), a Los Angeles attorney? [Tr. pp. 31-32]:

The claims would then

“ . . . be voted for a trustee or trustees who would be impartial and impersonal and who would not permit the administration of this estate to be influenced by the Attorney General of the State of California; . . . ”

(2) Were Craig & Weller and their associates even aware that the bankrupt was recommending the Board of Trade as aforesaid? [Tr. p. 34]:

*“I find that Craig & Weller or their associates do not represent any interest adverse to the trustees or this estate; . . . ”*

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ards. *Bratt v. Western Air Lines*, 10 Cir., 155 F. (2d) 850, 853. Surely it may seek out and apply the law behind a mere erroneous assertion that discretion is the issue.

That assertion of the issue of discretion in this case has been rebutted by the law discussed. There is no reasonable choice of alternatives upon which discretion could be exercised. It cannot be said to be present in a failure ‘to apply well settled law to a conceded state of facts.’ *Union Tool Co. v. Wilson*, 259 U. S. 107, 112. We have not here, as the parties and the district court appear to believe, a question of which of two courts might better decide an issue. We have rather a question which only one court can effectively decide. In this situation, we do not find it necessary to decide whether or not there was an abuse of legal discretion by the District Court. There was an error of law. *In re Sobol*, 2 Cir., 242 Fed. 487, 489.”

In other words, the appellants urge that the facts before both the Referee and the District Judge left no alternative to the District Judge, and that he should have reversed the order of the Referee without further delay.

(3) Was any real connection ever found by the Referee between the Board of Trade, the bankrupt and the voting of claims? [Tr. p. 34]:

"I find, however, that there was a connection between Craig & Weller and their associates on the one hand and the bankrupt corporation on the other, *in that even if it was done without the knowledge* (italics ours) of the Board of Trade or of Craig & Weller or their associates, the members and affiliates of the bankrupt corporation did, in fact, follow the aforesaid instructions of Mr. Bell and did suggest to creditors in this case, either orally or in writing, that they place their claims with the said Board of Trade for voting purposes in the selection of the Trustee or trustees in this case, and, at the same time, the claims of the said creditors were being solicited by or on behalf of the said Board of Trade for such voting purposes, of which fact Craig & Weller and their associates had actual knowledge."

However carefully the findings are examined, from stem to stern, *there is no finding that even one single claim was voted by or through the Board of Trade which claim was recommended by the bankrupt.*

(4) From the above findings was the Referee justified in attempting to exercise his judicial discretion on the basis of the two reasons (conclusions) which he placed in his findings of fact [Tr. p. 36]?

(a) [Tr. p. 36]: "That the employment by the trustees of Craig & Weller and their associates would

leave this Court and this estate open to the charge, even if it were unwarranted, that the said attorneys were influenced in the discharge of their duties and responsibilities, to the advantage or benefit of the bankrupt corporation or its president and dominating personality, Mr. Bell, by something which occurred at the time of the appointment of the trustees in this case.”

*\*Nota Bona:* “even if it were unwarranted” and “by something which occurred at the time of the appointment of the trustees in this case.” Not only would any charge or suspicion obviously be unwarranted, but the Referee participated in the examinations and proceedings and since he could find no “something which occurred” other than as set forth above, upon what imaginary basis are we to accept this reason as substantial evidence to support the exercise of judicial discretion!

(b) [Tr. p. 36]: “That such charge, if made, even though it be proved to be without foundation, would bring into question the fair and impartial administration of this estate and would cast a doubt upon the integrity of this Court.”

Again an unwarranted conclusion alleged as a reason for the exercise of judicial discretion; indeed, if fear of future investigation would govern our courts, even though admittedly unfounded, then must we concede that our courts are no longer governed by the fundamental concepts of due process of law so clearly enunciated by our Constitution and the decisions of our Supreme Court.

**B. The Order of the District Judge Recommitting the Matter to the Referee Is in Error Because It Fails to Give Any Recognition to the Fundamental Rules of Law Laid Down by This Court in the Prior Appeal, No. 11370.**

We respectfully submit that an analysis of the Referee's findings of fact, and the transcript of the testimony and exhibits before the Referee, gives to any impartial judicial review the answer to the various questions submitted by the order of the District Judge entered July 11, 1947, and specifically described as Subdivisions "a" to "u" of paragraph 3 of the aforesaid order. [Tr. pp. 45-49.]

(1) In subdivision "a" of paragraph 3 of the District Judge's order [Tr. p. 45] we find an inquiry as to whether or not the trustees now ask that their petition filed January 11, 1946, be granted; the District Judge had before him the verified petition of the aforesaid trustees seeking such an order, which petition was dated December 10, 1946 [Tr. pp. 24-25], and, in addition thereto, the verified petition of the trustees dated February 10, 1947 [Tr. pp. 37-42], being a petition for review of the Referee's order denying the right of the trustees to employ counsel. In the face of a record of this character, what justification is there for the inquiry of the District Judge as to whether or not the trustees now ask if their original petition to employ counsel be granted?

(2) Apparently the District Judge did not follow the contents of the judgment issued by this court in proceed-

ing No. 11370, for he asked the Referee to determine whether or not the verified petition of the trustees states “the reasons for (their) selection” as required by General Order 44 [Tr. p. 45]; if the District Judge had read the judgment of this Court passing on this verified petition in question, he would have found the matter *res judicata* in the following language: “. . . Every requirement of General Order 44 is fully satisfied by the allegations of the petition . . .” (See Appendix.)

Appellants could analyze, *seriatum*, all of the subdivisions of paragraph 3, and in each instance it would be obvious that the District Judge had before him the answer to his inquiry, or that the inquiry itself could not possibly affect the rights of the appellants herein as revealed by the contents of the record then before the District Judge.



- C. There Are Many Authorities Sustaining the Contention That Not All Participation by a Bankrupt or His Counsel Is Forbidden. It Is Only Objectionable When the Bankrupt Attempts to Control the Election of Trustees or Selection of Counsel for His Own Selfish and Adverse Interests.<sup>6</sup>
- D. A Bankrupt Wrongfully Desiring to Eliminate Certain Agencies or Attorneys From Participating in the Administration of an Estate Could Take Advantage of the Type of Ruling Issued by the Referee Herein and Bar Such Agencies or Counsel by Merely Sending Out a Blanket Letter of Recommendation. The Court Must Go Further and Find a Conspiracy, or at Least Knowledge of the Recommendation, Plus a Selfish Interest on Behalf of the Bankrupt.

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<sup>6</sup>*In the Matter of Crozen* (C. C. A. 2d, 1941), 118 F. (2d) 198, 45 Am. B. R. (N. S.) 586:

In considering claim No. 12 the Court stated, at p. 201:

" . . . To hold that a request to vote for particular candidate addressed to a creditor's attorney by an attorney representing independent creditors, or even by the bankrupt's attorney, was improper solicitation, seems fantastic. There is no evidence that this claim was voted in the interest of the bankrupt. *In re Mayflower Hat Co.* (C. C. A., 2nd Cir.), 23 Am. B. R. (N. S.) 366, 65 Fed. (2d) 330. The claim should be counted for Cregg."

*In the Matter of Universal Seal Cap Co.* (N. Y., 1941), 40 F. Supp. 420, 47 Am. B. R. (N. S.) 106. The fact that the attorney for a voting creditor had once represented the bankrupt corporation in trying to settle all claims, did not bar his participation in the election of a trustee. At page 110, Am. B. R. (N. S.) series the Court says, at p. 422:

"In any event, in the absence of good cause and substantial reason for interference with the choice of creditors, the selection of a trustee develops upon them rather than upon the Court."

- E. In the Event That This Court Were to Sustain the Ruling of the Courts Below, It Would Establish a Possible Precedent for Some Referee in the Future to Use the Reasoning of the Order, of February 12, 1947, as a Premise for Promoting Selfish Interests; After All, the Conjuring Up of a Ghost Such as the Fact That There Might Be Some Unwarranted Suspicion of the Bankruptcy Court in the Future Would Not Necessitate the Exercise of Too Much Imagination; Thereby, the Referee Could Disqualify Counsel and by Indirection Could Obtain the Employment of Counsel of His Own Choice. (As Has Been Indicated by the Threat of the Exercise of a Presidential Veto, Very Often Congress Will Pass an Enactment More in Accord With the President's Views Than if He Had Not Exercised This Threat.)
- F. If the Courts Below Intended to Criticize Solicitation of Claims by the Trade Agency Described as the Board of Trade, They Would Be Doing so Contrary to the Undisputed Weight of Authority.

(1) The Los Angeles Credit Managers Association, and its long-time predecessor, which was dissolved some three years ago, Los Angeles Wholesaler's Board of Trade, has a fine record of service to the community and particularly to local businessmen. The activity of this organization in the bankruptcy field has done a great deal toward maintaining the high degree of efficiency for which our Southern District is ordinarily noted. The Southern District of New York and several other districts adopted a rule attempting to disqualify attorneys who

represented creditors from acting as attorneys for the trustee. As a direct and positive mandate to the contrary our Congress amended Section 44 of the Bankruptcy Act of 1938 (See Bankruptcy Act, Sec. 44c; 11 U. S. C. A. Sec. 72c) and expressly eliminated any disqualification on the ground that the proposed attorney for the trustee likewise represented general creditors.

(2) This subject matter is well presented in Vol. 2, 14th Edition of Collier on Bankruptcy commencing at page 1669 of the Text to and including page 1671. See also discussions in: *Rinderknecht v. Toledo Association of Credit Men* (D. C. Ohio, 1935-36), 13 Fed. Supp. 555 and in the article of Referee Irwin Kurtz entitled, "The Credit Men's Place in Bankruptcy Administration" found in Vol. 9 of Journal of the National Association of Referees in Bankruptcy, No. 3, published in April of 1935.

There never was a contention by the Referee or anyone else that any of the appellants participated in any solicitation of claims. Furthermore, we must not overlook the fact that if the last minute recommendations of the bankrupt had been successful, the claims involved would have been forwarded to an existing agency, to-wit, Los Angeles Board of Trade [Old Tr. p. 47], which agency was in no way connected with the Los Angeles Credit Managers Association, located at a different address, and which latter entity is the one represented by Craig & Weller and their associates. [Tr. p. 79.] Also,

no claims appear to have been filed by the aforesaid Los Angeles Board of Trade, either by any of the appellants herein or in any other manner. From the evidence considered by the Referee and from his findings, it is obvious that the activity of the bankrupt or his agents for the purpose of having claims voted "for a trustee or trustees who would be impartial and impersonal, and who would not permit this estate to be influenced by the Attorney General of the State of California; . . ." [Tr. pp. 31-32] was a purpose not carried out by any effectual solicitation.

### Conclusion.

The Circuit Court of Appeals in the original proceeding before this Court rightfully ruled that your appellants were entitled to a hearing on their petition and a judicial deliberation on the issues involved. Tested in the atmosphere of open court proceedings, the findings of fact, as well as the evidence, reveal that the sole basis for the ruling of the Referee is his fear that some day the bankruptcy court might be subjected to suspicion, even though unwarranted. Obviously, this does not constitute a rare case, or good reason to deny the original petition for employment. The action taken by the District Judge in recommitting the matters involved to the Referee in Bankruptcy was an arbitrary exercise of his judicial discretion unwarranted under the circumstances and contrary to the promotion of the ends of justice, particularly since no foundation appears in the record before the Dis-



tract Judge which might possibly bring the findings of fact within the requirements of law as enunciated by this Honorable Court in order to justify a denial of the petition of the Trustees to employ counsel of their own choice.

Wherefore, your petitioners pray that this Court forthwith reverse the order of the Referee dated February 12, 1947 [Tr. pp. 28-37], reverse the recommitting order of the District Judge dated July 11, 1947 [Tr. pp. 44-49], and make and enter an order granting the original petition for employment of counsel by the trustees, as filed herein on the 11th day of January, 1946. [Old Tr. pp. 9-12.]

Respectfully submitted,

FRANK C. WELLER,

THOMAS S. TOBIN, and

MARTIN GENDEL,

By MARTIN GENDEL,

*Attorneys for Appellants.*









## APPENDIX.

### In the United States Circuit Court of Appeals for the Ninth Circuit.

In the Matter of Christ's Church of the Golden Rule, a non-profit California corporation, Bankrupt, Paul W. Sampsell, L. Boteler and Stewart McKee, Trustees in Bankruptcy of the Estate of Christ's Church of the Golden Rule, a non-profit California corporation, Bankrupt, Frank C. Weller, Thomas S. Tobin and Martin Gendel, Appellants. No. 11,370, No. 15, 1946.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Before: Denman, Healy and Bone, Circuit Judges.

DENMAN, *Circuit Judge*:

This is an appeal from an order of the District Court in the above bankruptcy proceeding confirming the denial by the referee of the petition of the above trustees for the employment of certain persons as their attorneys. The ground of the appeal is the claim that, without hearing on the petition, which satisfied all the requirements of General Order in Bankruptcy No. 44, the referee denied the employment of the attorneys sought by the trustees.

We think the court and referee erred in proceeding *ex parte* and in not having a hearing on the petition. General Order 44 provides

"No attorney for a receiver, trustee or debtor in possession shall be appointed except upon the order of the court, which shall be granted only upon the verified peti-

tion of the receiver, trustee, or debtor in possession, stating the name of the counsel whom he wishes to employ, the reasons for his selection, the professional services he is to render, the necessity for employing counsel at all, and to the best of the petitioner's knowledge all of the attorney's connections with the bankrupt or debtor, the creditors or any other party in interest, and their respective attorneys. If satisfied that the attorney represents no interest adverse to the receiver, the trustee, or the estate in the matters upon which he is to be engaged, and that his employment would be to the best interests of the estate, the court may authorize his employment, and such employment shall be for specific purposes unless the court is satisfied that the case is one justifying a general retainer . . ." (Emphasis supplied.)

An inspection of the trustees' verified petition shows that it stated the complicated character of the trustees' anticipated litigation, creating a special need of counsel for the successful discharge of the trustee obligation. Every requirement of General Order 44 is fully satisfied by the allegations of the petition. As was stated by the Second Circuit with reference to General Order 44 in the Matter of Mandell, 69 F. 2d 830,

"Only in the rarest cases should the trustee be deprived of the privilege of selecting his own counsel, and the reasons which make it for the best interest of the estate to have the court select the attorney over the Trustee's objections should appear in the record."

The Fourth Circuit in *Kanter v. Robertson*, 102 F. 2d 92, 93, stated of the relations between the trustee and his attorney



“ . . . Ordinarily the choice of an attorney for the Trustee rests with the trustee subject to the approval or disapproval of the referee or judge, and the choice of the trustee should be confirmed unless good reasons appear to the contrary.”

The reasons of the referee “to the contrary” were arrived at by an *ex parte* process of which the trustees had no knowledge until the order was entered. Thus the referee frustrated the *first* choice of the trustees for their attorneys for the important and difficult work before them.

The referee frankly says he makes no findings of fact on the allegations of the petition because the proceeding is *ex parte*. He states he was in receipt of certain communications which raised a question in his mind as to whether the proposed attorneys might have an interest which would disqualify them. We think that under General Order 44 the petitioning trustees are entitled to a hearing on their petition for a judicial deliberation on the matters the referee has in mind.

The trustees ask us to pass on the sufficiency of the matters outlined but not found in the referee’s report to warrant a refusal to permit the employment of the proposed attorneys. This would be futile for we do not know what importance they may have as the issue is developed at the hearing.

The order appeal from is reversed and the case remanded for a hearing on the merits of the petition for the employment of the attorneys.

(Endorsed): Opinion. Filed Nov. 15, 1946. Paul P. O’Brien, Clerk.



No. 11736

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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E. ROYCE, B. ROYCE and A. H. WENCK, doing  
business as Gray Line Tours,  
Appellants.

vs.

CLARK SQUIRE, Collector of Internal Revenue  
for the District of Washington,  
Appellee.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the Western District of Washington,  
Southern Division

FILED

NOV 12 1947

PAUL P. O'BRIEN,  
CLERK



No. 11736

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## ATTORNEYS OF RECORD

R. T. JACOB, ESQ.,

RANDALL S. JONES, ESQ.,

917 Public Service Building,

Portland, Oregon,

Attorneys for Plaintiffs-Appellants.

J. CHARLES DENNIS, ESQ.,

United States Attorney.

HARRY SAGER, ESQ.,

Assistant United States Attorney.

324 Federal Building,

Tacoma, Washington.

THOMAS R. WINTER, ESQ.,

Special Assistant to the Chief Counsel,

Bureau of Internal Revenue,

713 Smith Tower Building,

Seattle, Washington,

Attorneys for Defendant-Appellee.

In the District Court of the United States  
for the District of Washington

No. 876

E. ROYCE, B. ROYCE and A. H. WENCK,  
d/b/a Gray Line Tours,  
Plaintiffs,

vs.

CLARK SQUIRE, United States Collector of Internal Revenue for the District of Washington,  
Defendant.

### COMPLAINT

Come now the Plaintiffs and for cause of action against the above named Defendant, allege as follows:

#### I.

That at all times herein mention: Plaintiff, E. Royce, was, and still is, a resident of Portland, Multnomah County, Oregon; Plaintiff, B. Royce, was, and still is, a resident of Vancouver, Clark County Washington,, and Plaintiff A. H. Wenck, was, and still is, a resident of Seattle, King County, Washington, and Plaintiffs were, and still are, engaged in the business of transporting passengers in motor vehicles, under the firm name and style of "Gray Line Tours," having its principal place of business at Seattle, Washington.

#### II.

That at all times herein mentioned, Defendant was, and now is, United States Collector of Internal

Revenue for the District of Washington, stationed at Tacoma, Washington.

### III.

Jurisdiction of the within cause rests upon the Judicial Code of the United States, Section 3469, as amended by the Revenue Act of 1943 (26 USCA Subdivision (a) and the provisions of Section 322.

### IV.

That during the period from October 1, 1941 to September 30, 1944, Defendant assessed to Plaintiffs and Plaintiffs paid to the Defendant, Transportation Taxes in the total amount of \$16,423.51, said taxes being upon passengers transported in motor vehicles having a seating capacity of less than ten (10) adult passengers including the driver thereof, and which said vehicles were not operated on an established line.

### V.

That the said taxes were illegally assessed and collected by the Defendant herein, by reason of the fact that the provisions of the United States Revenue Acts specifically exempt charges for transportation in the manner and under the conditions under which the motor vehicles of Plaintiffs' were operated, and Defendant now illegally withholds from Plaintiffs the said taxes thus illegally collected, although demand for the refund thereof has been made upon him.

## VI.

That on the 30th day of November, 1944, Plaintiffs filed and lodged with the Defendant herein a Claim properly and duly prepared and executed upon the form in such cases provided, for the refund of said \$16,423.61, together with interest as provided by law.

## VII.

That on the 19th day of June, 1945, the Commissioner of Internal Revenue rejected said Claim for Refund.

Wherefore, Plaintiffs pray for judgment against the Defendant in the principal sum of \$16,423.51, together with interest as provided by law from the respective dates of payments of said taxes, together with their costs and disbursements incurred herein.

April 18th, 1946.

/s/ ROBT. T. JACOB,

Counsel for Plaintiffs,

917 Public Service Bldg.

Portland 4, Oregon.

/s/ JOSEPH E. GANDY.

[Endorsed]: Filed April 2, 1946.

[Title of District Court and Cause.]

### ORDER

It appearing that through error the above entitled cause was filed in the Northern Division of the District Court of the United States for the Western District of Washington, and it further appearing that the defendant above named, "Clark Squire, United States Collector of Internal Revenue for the District of Washington," is a resident of The Southern Division of the District Court of the United States for the Western District of Washington, as shown by Paragraph 2 of the complaint filed in this cause, and that said proceeding should have been filed in said Southern Division, and the Court being fully advised in the premises,

It Is Hereby Ordered that the above entitled cause be and the same hereby is transferred from the Northern Division of the District Court of the United States for the Western District of Washington to the Southern Division of the District Court for the Western District of Washington, and the Clerk of this Court is hereby directed to forward all of the pleadings filed in said cause to the Clerk of the District Court of the United States, Western District of Washington, Southern Division, at Tacoma.

Done in Open Court this 24th day of April, 1946.  
Presented by: JOHN C. BOWEN,

United States District Judge.

JOSEPH E. GANDY,

Attorney for Plaintiffs.

[Endorsed]: Filed April 24, 1946.



[Title of District Court and Cause.]

### ANSWER

Defendant answers, by paragraph numbers corresponding to paragraph numbers of the complaint, as follows:

I.

Admitted.

II.

Admitted.

III.

Admitted.

IV.

Denied, except admits that there was assessed and paid to the defendant by the plaintiffs a transportation tax in the amount of \$16,423.51.

V.

Denied.

VI.

Admitted.

VII.

Admitted.

### ADDITIONAL DEFENSE

I.

Defendant, as additional defense, alleges that the complaint should be dismissed under Section 3471 of the Internal Revenue Code, since the complaint does not allege that the plaintiffs have repaid the amount of the taxes to the persons from whom they

collected such taxes or obtained the consent of such persons to the allowance of such credit or refund.

Wherefore, having fully answered, defendant prays judgment and costs.

/s/ J. CHAS. DENNIS,  
United States Attorney.

/s/ HARRY SAGER,  
Assistant United States  
Attorney.

/s/ THOMAS R. WINTER,  
Special Assistant to the Chief Counsel, Bureau of  
Internal Revenue.

[Endorsed]: Filed July 22, 1946.

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[Title of District Court and Cause.]

### ORDER ON PRE-TRIAL HEARING

This matter having come on regularly for pre-trial hearing before the Honorable Charles H. Leavy, United States District Judge, on the..... day of April, 1947, and the plaintiffs being represented by Robert T. Jacob, Esq., Randall S. Jones, Esq., and Joseph E. Gandy, Esq., their attorneys, and the defendant being represented by Harry Sager, Esq., and Thomas R. Winter, Esq., of his attorneys, and upon the proceedings had at said hearing, it is

Ordered that the following facts are admitted by

the parties and are accepted as established facts in this case:

1. At all times herein mentioned, plaintiff, E. Royce, was, and still is, a resident of Portland, Multnomah County, Oregon; plaintiff, B. Royce, was, and still is, a resident of Vancouver, Clark County, Washington, and plaintiff, A. H. Wenck, was, and still is, a resident of Seattle, King County, Washington, and plaintiffs were, and still are, engaged in the business of transporting passengers in motor vehicles, under the firm name and style of "Gray Line Tours," having its principal place of business in Seattle, Washington.

2. At all times herein mentioned, defendant was, and now is, United States Collector of Internal Revenue for the District of Washington, stationed at Tacoma, Washington.

3. Jurisdiction of the within cause rests upon the Judicial Code of the United States, Section 3469, as amended by the Revenue Act of 1943 (26 U.S.C.A., Subdivision (a) and the provisions of Section 322.

4. Plaintiffs, on February 28, 1942, filed with the defendant delinquent returns on tax for transportation of persons for the months of October, November and December, 1941, and timely returns for period January 1, 1942, through September 30, 1944, and paid the sums as taxes, penalties and interest in the amount of \$16,423.51, as shown by pre-trial Exhibits 1, 2 and 3.

5. On the 30th day of November, 1944, plaintiffs filed and lodged with the defendant herein a claim on proper form in such cases provided for the refund of said \$16,423.51, together with interest as provided by law.

6. On the 19th day of June, 1945, the Commissioner of Internal Revenue rejected said claim for refund.

7. Plaintiffs and their predecessor corporation have engaged in such business since April, 1934. The principle activity in the field of local transportation since May 1, 1941, has consisted of transportation of persons. Plaintiffs about that time entered into agreements or arrangements with the United Air Lines, Northwest Airlines and Pan-American World Airways to provide limousine service. Exhibit 4 is the contract between the plaintiffs predecessors and the United Air Lines. There were no other written agreements between the plaintiffs and the air lines, except such as may be reflected in correspondence, if any.

8. Plaintiffs' limousine fleet until January 6, 1945, consisted of five seven-passenger limousines and, while plaintiffs contend it is immaterial, on that date an eleven-passenger limousine was added to the fleet, and it has been operated in the same manner as the seven-passenger limousines. Plaintiffs operated five other seven-passenger limousines for their funeral service and also a twenty-passenger bus was used in charter service to the air lines for out-of-town service only. No taxes for transporta-

tion on the eleven-passenger limousine, the limousines when used for funeral service nor the twenty-passenger bus are involved in this action. If needed, however, the cars used for funeral service were operated on the air line service and taxi cabs were hired to handle the overflow on the air line service.

9. Four of the limousines customarily used in the regular air line service were painted gray and one was painted black. On most limousines during most of the period involved, there were placed painted detachable emblems of the air line companies which were twelve inches square or round and were placed on the right front door of the limousines. These were changed on the particular limousine used showing the particular air line whose passengers were being transported to or from a scheduled air line flight. For some time, signs have been painted on the limousines, rectangular in shape, bearing the word "Air Line Service" and underneath in smaller letters the words "Gray Line Tours."

10. The air line companies did not sell or issue tickets in connection with flight passage that were good for transportation to or from airports in the plaintiffs' limousines; however, they published schedules of fares of the limousine service, as shown by pre-trial Exhibit 5.

11. Air line passengers, when purchasing tickets for a scheduled flight, were asked by employees of the air lines whether they desired limousine service or whether they would use their own transportation.



In cases where air line passengers desired such limousine service they were advised of the places of departure of passengers which were usually the offices of the air line companies, the Olympic Hotel, the New Washington Hotel and/or one or more hotels designated at the time. They were also advised of the time of the departure of the limousines from those places, which was approximately one hour prior to the air line flight. Also, approximately one hour before the plane was scheduled to leave the airport, the air line office would notify the plaintiffs' dispatcher when the flight was leaving, names of the passengers who were scheduled to use the limousine service and the places from which they were scheduled to depart. Prior to the arrival of an incoming flight, the air lines would notify the plaintiffs' dispatcher of the time of the plane's arrival. The plaintiffs would then send a limousine to the airport to transport any passengers desiring limousine service to the said metropolitan area. In case of emergency, adverse weather conditions or when Boeing Field was unavailable, plaintiffs would dispatch a bus or limousine to or from other fields, and such service was billed to the air line, the tax liability on which transportation is not herein involved.

12. Under the agreements or arrangements with the air lines, the plaintiffs were required to meet all incoming scheduled plane flights and frequently limousines were sent out to the airport, without passengers, to meet an incoming plane. If there were no incoming air line passengers using the limousine

transportation back to the metropolitan area, the limousine might wait at the airport until the arrival of the next scheduled flight or be ordered back to town by plaintiffs' dispatcher. It was sometimes necessary to order limousines back from an airport to the metropolitan area in order to transport passengers from the metropolitan area to a scheduled outgoing flight.

13. Plaintiffs' limousines never accepted passengers without being called by the air lines' office and being told whom the passengers were and the time and places where passengers were to meet the limousine for departure. While the defendant contends it is immaterial, the City of Seattle maintains a city street bus line running from its metropolitan area to the Boeing Airport under the management of the Seattle Transit Commission, a Commission consisting of three people appointed by the Mayor of said City, and this city street bus line operates on an established time schedule over the city streets on a fixed route.

14. While the defendant contends it is immaterial, all of said vehicles, including the said eleven-passenger limousine, are licensed as "for hire" vehicles under the laws of the State of Washington, as defined in Section 6312-1, et seq., Remington's Revised Statutes of Washington, and operate as "for hire" vehicles in the City of Seattle under Ordinance No. 59866, a copy of which ordinance is pre-trial Exhibit 6.

15. Prior to October 10, 1941, the plaintiffs established one-way fare was \$.75 between the designated places of departure in the metropolitan area and the Boeing Airport, and the same one-way fare was charged between the airport and the metropolitan area. On October 10, 1941, the plaintiffs started collecting \$.80 per passenger. Section 3469 of the Internal Revenue Code, as added by Section 554 of the Revenue Act of 1941, imposing a transportation tax of 5 percent, became effective on said date. The plaintiffs, starting November 1, 1942, through November 21, 1942, collected \$.84 per passenger. The tax rate was increased by Section 609 of the Revenue Act of 1942 to 10 per cent, effective on said November 1, 1942. On November 22, 1942, plaintiffs started collecting \$.85 per passenger until April 1, 1944, and on and after said date began collecting \$.90 per passenger. Section 302(a) of the Revenue Act of 1943 became effective on said April 1, 1944, and it increased the rate to 15 per cent. From October 10, 1941, to April 1, 1944, the air lines were billed by plaintiffs for \$.75 per passenger carried at the air lines' expense, plus 5 percent or 10 percent of the amount billed as a tax, depending upon the tax rate then in effect. On and after April 1, 1944, the air lines were billed by the plaintiffs for \$.78 per passenger carried at the air lines' expense, plus 15 percent of the amount billed as a transportation tax, all of which is indicated on schedule, pre-trial Exhibit 7. Pre-trial Exhibit 8 is samples of such billings for the various periods herein involved.

16. Plaintiffs furnished their drivers with new schedules of airport fares upon the effective date of each increase mentioned in paragraph 15, of which pre-trial Exhibit 9 is a sample during the period subsequent to April 1, 1944. The drivers would collect the fares existing at the time for the transportation from the passengers carried, except passengers carried at the expense of the air lines, and in cases where a passenger would ask what the fare included, a driver himself would tell the passenger it included the tax.

17. Plaintiffs' drivers turned in the cash collected with their "daily turn-in sheets" to their dispatchers who checked them and prepared a daily operating report, summarizing cash fares, tax, charge fares and tax. Plaintiffs' bookkeeper prepared "monthly summary of daily operating reports." Exhibits 10 and 11 are samples for each period of "daily turn-in sheets" and "monthly summary of daily operating reports," respectively. The cash fares and tax were then entered in the plaintiffs' cash journal. Exhibit 12 is the cash journal sheet of plaintiffs for October, 1941. The cash fares and tax are maintained as separate items and the amounts reported in the tax returns filed are the sums of the monthly total collected as taxes on cash fares and the monthly total billed to and collected from the air lines as taxes. The amounts collected as taxes in the cash journal were posted monthly to an account in the plaintiffs' general ledger entitled "Federal Transportation Tax," Ac-



count No. 2026E. Pre-trial Exhibit 13 is copies of that account in the general ledger. The taxes are shown on the plaintiffs' books as an accrued liability account and the taxes collected, aforesaid, have not been closed into the plaintiffs' profit and loss account nor reported in its income tax liability during any of the period involved.

18. All sums collected from the individual passengers and from the air lines, including the amounts billed and collected as tax, were deposited in the plaintiffs' bank account and the sums paid by plaintiffs to the defendant, as shown by said returns, were paid by checks drawn by plaintiffs on their said bank account.

### Issues

It is ordered that the following are the issues to be submitted to the Court for determination:

#### I.

Whether or not, during the period October 10, 1941, through September 30, 1944, the plaintiffs in transporting passengers in their motor vehicles, involved in this action, were operating their said vehicles "on an established line" within the meaning of Section 3469 of the Internal Revenue Code and the applicable regulations. The plaintiffs, however, reserve the privilege of contesting the validity of any such regulation.

#### II.

Whether the plaintiffs erroneously or illegally overpaid from their own funds any taxes or whether



the plaintiffs over-collected from the persons transported and overpaid said taxes to the defendant and have established a right to a refund or credit within the meaning of the statutes and regulations applicable thereto. The defendant, however, does not waive his additional defense set forth in his answer; and plaintiffs, therefore, do not waive their motion to amend, by interlineation, paragraphs IV and V of their complaint.

### III.

Whether or not the plaintiffs are entitled to a refund of the said sum of \$16,423.51, or any part thereof, paid to the defendant by the plaintiffs as aforesaid.

It is ordered that the contentions of the respective parties are as follows:

#### Contentions of Plaintiffs

##### I.

That in transporting said passengers plaintiffs were not operating their said vehicles "on an established line" within the meaning of said statutes and regulations.

##### II.

That because of the fact set forth in paragraph I of plaintiffs' contentions, the amounts of money paid as fares to the plaintiffs by said passengers were not taxable under the provisions of said statutes.

## III.

That the said amounts assessed and paid as taxes as aforesaid were assessed upon fares mentioned in paragraphs II of plaintiffs' contentions, and said payment of said amounts was made to the defendant by the plaintiffs from their own funds. Plaintiffs, when making said payments, were under the mistaken and erroneous assumption that the transportation of passengers to and from said airports in said seven-passenger limousines was subject to the tax imposed by said Section 3469, Internal Revenue Code and amendments thereto.

## IV.

That the said amounts were illegally assessed and collected as taxes by the defendant herein, by reason of the fact that the provisions of said statutes specifically exempt charges for transportation in the manner and under the conditions under which the motor vehicles of plaintiffs' were operated, and defendant now illegally withholds from plaintiffs the said amounts thus illegally collected, although demand for the refund thereof has been made upon him.

## Contentions of the Defendant

## I.

That the complaint should be dismissed under Section 3471 of the Internal Revenue Code, since the complaint does not allege that the plaintiffs have repaid the amount of the taxes to the persons from whom they collected such taxes or obtained the consent of such persons to the allowance of such credit or refund.

## II.

That the taxes, penalties and interest for which refund and judgment are claimed were paid as tax collected in connection with the amounts paid for the transportation of persons, furnished by means of motor vehicles operated on an established line, within the meaning of Section 3469 of the Internal Revenue Code, as added by Section 554 of the Revenue Act of 1941, and Section 130.58 of Regulations 42, and the said tax was, therefore, legally assessed and collected.

## III.

That the taxes, penalties and interest for which refund and judgment are claimed were not paid by the plaintiffs from their own funds but that at the precise effective dates of the Government's taxes the passenger fare charged was increased to an amount sufficiently high to include the tax; that this was done because of the effective tax becoming operative.

## IV.

That even though the plaintiffs have over-collected and over-paid the tax, they have not established that the tax so over-collected and over-paid has been returned to the person from whom collected or have obtained the written consent of such person to such refund, within the meaning of Section 3772 of the Internal Revenue Code and Section 130.78 of Regulation 42.

It Is Ordered that in support of their said contentions the parties hereto may introduce evidence of facts in addition to and in explanation of the facts hereinabove set forth.

Exhibits

It Is Ordered that the parties may offer in evidence at the trial of this action any and all of the following Pre-Trial Exhibits without further identification or authentication, but subject to any and all other objections:

Pre-Trial Exhibit 1. Plaintiffs' monthly returns on Form 727, revised 1941, for months of October, November and December, 1941.

Pre-Trial Exhibit 2. Plaintiffs' monthly returns on Form 727, revised 1941, for the period January, 1941, through September, 1944.

Pre-Trial Exhibit 3. Claim for refund and attached certificate, schedule statement and Commissioner's letter of rejection, dated May 31, 1945.

Pre-Trial Exhibit 4. Contract between United Air Lines Transport Corp. and plaintiffs' predecessor corporation, dated May 7, 1941.

Pre-Trial Exhibit 5. Time tables of Pan-American Airways, dated June-October, 1941, and March, 1945; United Air Lines, dated October 1, 1944, and March 15, 1945, and Northwest Airlines, dated March 18, 1945.

Pre-Trial Exhibit 6. City of Seattle Ordinance No. 59866.

Pre-Trial Exhibit 7. Schedule of fares and tax for periods October 10, 1941, through September, 1944.

Pre-Trial Exhibit 8. Samples of plaintiffs' billings to air lines for each period involved.

Pre-Trial Exhibit 9. Plaintiffs' schedule of airport fares furnished drivers.

Pre-Trial Exhibit 10. Drivers' daily turn-in sheets.

Pre-Trial Exhibit 11. Copies for each period of "daily" and "monthly summary of daily operating reports."

Pre-Trial Exhibit 12. Plaintiffs' Cash Journal sheet for October, 1941.

Pre-Trial Exhibit 13. Plaintiffs' "Federal Transportation Account," No. 2120E.

Pre-Trial Exhibit 14. Inter-office letter of instructions United Air Lines, dated October 23, 1943.

Pre-Trial Exhibit 15. Letter dated March 8, 1945, to Gus Wenck, Manager, Gray Line Tours, from H. William Bernhardt, Assist. Traffic Manager, Pan-American Airways.

Pre-Trial Exhibit 16. Map of Seattle prepared for Seattle Chamber of Commerce.

Pre-Trial Exhibit 17. Map of City of Seattle.

\*Pre-Trial Exhibit 5 Also includes Northwest Airlines time tables dated September, 1941, December, 1941, November, 1942, and June, 1944.

It Is Ordered that further exhibits may be offered in evidence by plaintiffs or defendant at the trial, and that if an exhibit or exhibits, other than those identified herein, are offered and received in evidence the other party shall have a reasonable opportunity to submit opposing evidence before the case is closed.



The foregoing is certified to be a record of the proceedings had at the Pre-Trial of this cause, and

It Is Ordered that the issues to be tried herein shall be those hereinabove set forth.

Dated at Tacoma, Washington, this 1st day of May, 1947.

/s/ CHARLES H. LEAVY,  
U. S. Dist. Judge.

Approved:

/s/ RANDALL S. JONES,  
Attorney for Plaintiffs.

/s/ THOMAS R. WINTER,  
Attorney for Defendant.

[Endorsed]: Filed May 1, 1947.

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[Title of District Court and Cause.]

## DOCKET ENTRIES

1946

Apr. 22—Filed Complaint (No. Div. No. 1532)

Apr. 22—Filed Praecipe—Issued Summons

Apr. 24—Filed Order (Sea.) transf. case to So. Div.

June 20—Filed Stip. allow. deft. to 7/22/46 to Ans.

June 20—Filed Order allow. deft. to 7/22/46 to Ans.

July 22—Filed Answer

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Feb. 4—Trial set for Apr. 14

Apr. 12—Filed Praecipe, deft.—Issued Subp. (2)

Apr. 14—Case called for trial; Robt. Jacob & Randall Jones allowed appear as assoc. counsel for Pltfs.; trial date passed for completion of pre-trial order

Apr. 16—Filed Ret. on Subp.

Apr. 16—(At Sea.)—Pretrial Order lodged; set for trial at Seattle Apr. 30, 2 p.m.

Apr. 22—Filed Reporter's Transcript of Proceedings (of 4/14/47)

Apr. 30—Trial passed to May 1st at Tacoma

May 1—Filed Praecipe, Pltfs.—Issued 2 Subp.—Filed Ret.

May 1—Ent. record hearing re entry Pre-Trial Order

May 1—Filed and entered Pre-Trial Order

May 1—Ent. record trial (before Court) commenced. Court orally finds for deft. and case to be dis.; written F & C & Decree later

June 4—Filed Reporter's Transcript of Proceedings (of 5/1/47)

June 16—Filed & ent. Findings of Fact and Conclusions of Law (with Exceptions attached)

June 16—Filed and ent. Judgment: Compl. dis. with prej. and with costs in favor deft.

1947

- June 16—Filed Cost Bill, U. S. (\$2297)
- June 16—Notice of entry of Judgm. sent atty, for Pltfs.
- Aug. 21—Filed Transcripts of Proceedings (trial of 5/1/47) in dup.
- Aug. 22—Filed Notice (Pltfs.) of Appeal—Copy del. to U. S. Atty. and Thos. R. Winter
- Aug. 22—Filed Bond on Appeal
- Aug. 22—Filed Statement of Pts. on which Appellants Intend to Rely
- Aug. 23—Filed Designation of Contents of Record on Appeal
- Aug. 25—Filed Order for transmittal of orig. exhibits to C.C.A.
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[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial on the 1st day of May, 1947, before the above-entitled Court, Honorable Charles H. Leavy presiding therein, sitting without a jury, plaintiffs appearing by their attorneys, Robert T. Jacob, Esq., Randall S. Jones, Esq., and Joseph E. Gandy, Esq., being represented in Court by Randall S. Jones, Esq., and defendant appearing by his attorneys, J. Charles Dennis, United States Attorney for the Western District of Washington,

Harry Sager, Assistant United States Attorney for said District, and Thomas R. Winter, Special Assistant to the Chief Counsel, Bureau of Internal Revenue, being represented in Court by Thomas R. Winter, and the Court having signed and entered an order on the pre-trial hearing and witnesses having been sworn and having testified, exhibits introduced in evidence, oral argument by counsel, and the Court having rendered an oral opinion and the Court being fully advised, now makes the following

### Findings of Fact

#### I.

At all times herein mentioned, plaintiff, E. Royce, was, and still is, a resident of Portland, Multnomah County, Oregon; plaintiff, B. Royce, was, and still is, a resident of Vancouver, Clark County, Washington, and plaintiff, A. H. Wenck, was, and still is, a resident of Seattle, King County, Washington, and plaintiffs were, and still are, engaged in the business of transporting passengers in motor vehicles, under the firm name and style of "Gray Line Tours," having its principal place of business in Seattle, Washington.

#### II.

At all times herein mentioned, defendant was, and now is, United States Collector of Internal Revenue for the District of Washington, stationed at Tacoma, Washington.

## III.

Jurisdiction of the within cause rests upon the Judicial Code of the United States, Section 3469, as amended by the Revenue Act of 1943 (26 U.S.C.A., Subdivision (a)) and the provisions of Section 322.

## IV.

Plaintiffs, on February 28, 1942, filed with the defendant delinquent returns on tax for transportation of persons for the months of October, November and December, 1941, and timely returns for the period January 1, 1942, through September 30, 1944, and paid the sums as taxes, penalties and interest in the amount of \$16,423.51.

## V.

On the 30th day of November, 1944, plaintiffs filed and lodged with the defendant herein a claim on proper form in such cases provided for the refund of said \$16,423.51, together with interest as provided by law.

## VI.

On the 19th day of June, 1945, the Commissioner of Internal Revenue rejected said claim for refund.

## VII.

Plaintiffs and their predecessor corporation have engaged in such business since April, 1934. Their principle activity in the field of local transportation since May 1, 1941, has consisted of transportation



of persons. Plaintiffs' predecessor corporation, about that time, entered into a written contract or agreement, dated May 7, 1941, with the United Air Lines Transport Corporation to provide transportation service for passengers of said United Air Lines to and from the airport at Boeing Field, Seattle, Washington. Oral agreements or similar arrangements were later made with the Northwest Airlines and Pan-American World Airways. There were no subsequent or other written agreements between the plaintiffs and the airlines, and the transportation service has continued to be operated in substantially the same manner during all the period involved.

### VIII.

Plaintiffs' limousine fleet until January 6, 1945, consisted of five seven-passenger limousines. On that date an eleven-passenger limousine was added to the fleet, and it has been operated in the same manner as the seven-passenger limousines. Plaintiffs operated five other seven-passenger limousines for their funeral service and also a twenty-passenger bus was used in charter service to the air lines for out-of-town service only. No taxes for transportation on the eleven-passenger limousine, the limousines when used for funeral service nor the twenty-passenger bus are involved in this action. If needed, however, the cars used for funeral service were operated on the air line service and taxi cabs were hired to handle the overflow on the air line service.

## IX.

Four of the limousines customarily used in the regular air line service were painted gray and one was painted black. On most limousines during most of the period involved, there were placed painted detachable emblems of the air line companies which were twelve inches square or round and were placed on the right front door of the limousines. These were changed on the particular limousine used showing the particular air line whose passengers were being transported to or from a scheduled air line flight. For sometime, signs have been painted on the limousines, rectangular in shape, bearing the words "Air Line Service" and underneath in smaller letters the words "Gray Line Tours."

## X.

The air line companies did not sell or issue tickets in connection with flight passage that were good for transportation to or from airports in the plaintiffs' limousines; however, they published schedules of fares of the limousine service.

## XI.

Air line passengers, when purchasing tickets for a scheduled flight, were asked by employees of the air lines whether they desired limousine service or whether they would use their own transportation. In cases where air line passengers desired such limousine service they were advised of the places of departure of passengers which were usually the

offices of the air line companies, the Olympic Hotel, the New Washington Hotel and/or one or more hotels designated at the time. They were also advised of the time of the departure of the limousines from those places, which was approximately one hour prior to the air line flight. Also, approximately an hour before the plane was scheduled to leave the airport, the air line office would notify the plaintiffs' dispatcher when the flight was leaving, names of the passengers who were scheduled to use the limousine service and the places from which they were scheduled to depart. Prior to the arrival of an incoming flight, the air lines would notify the plaintiffs' dispatcher of the time of the plane's arrival. The plaintiffs would then send a limousine to the airport to transport any passengers desiring limousine service to the said metropolitan area. In case of emergency, adverse weather conditions or when Boeing Field was unavailable, plaintiffs would dispatch a bus or limousine to or from other fields, and such service was billed to the air line, the tax liability on which transportation is not herein involved.

## XII.

No air line passengers were picked up in the down town district, except at points designated by the air lines and pursuant to a telephone call from the air lines. The said down town district was considered by the plaintiffs and the air lines to be that area in the City of Seattle bounded on the North by Lenora Street, on the East by Ninth

Avenue, on the South by Boeing Field, and on the West by the waterfront of Puget Sound. The plaintiffs' drivers were instructed to follow the most direct route between Boeing Field and the said down town district, but they were free to, and did, select the streets over which they travelled, and they usually used Southwest Fourth Avenue or Airport Way when going to and from Boeing Field, as the trip over either street is of equal distance, but in cases of traffic congestion or when streets were undergoing repairs, the drivers themselves selected other streets upon which to travel. In returning to the business district from said Field, Southeast Ninth Avenue was used from time to time by some drivers.

### XIII.

Approximately 50 per cent of the air line passengers used limousine service and from 10 per cent to 15 per cent of all flights were postponed by the air lines due to weather conditions. About 5 per cent of the flights were to and from fields other than Boeing Field due to weather conditions, and Boeing Field during the war period was temporarily closed to civilian use. In cases of such emergencies, the plaintiffs carried air line passengers by means of said limousines or other motor vehicles to Paine Field or the Seattle-Tacoma Airport, distances of approximately 30 and 11 miles, respectively, from said down town district of Seattle, and when limousines were being operated by plaintiffs



to or from either Paine Field or the Seattle-Tacoma Airport, no limousines were operated between said Boeing Airport and said down town district of Seattle. No taxes for transportation on the limousines or other motor vehicles used in the transportation of persons to or from Paine Field and Seattle-Tacoma Airport are involved in this action.

#### XIV.

Under the agreement and/or arrangements with the air lines, the plaintiffs were required to meet all incoming scheduled plane flights and frequently limousines were sent out to the airport, without passengers, to meet an incoming plane. If there were no incoming air line passengers using the limousine transportation back to the metropolitan area, the limousine might wait at the airport until the arrival of the next scheduled flight or be ordered back to town by plaintiffs' dispatcher. It was sometimes necessary to order limousines back from an airport to the metropolitan area in order to transport passengers from the metropolitan area to a scheduled outgoing flight.

#### XV.

Plaintiffs' limousines never accepted passengers without being called by the air lines' office and being told whom the passengers were and the time and places where passengers were to meet the limousine for departure. The City of Seattle maintains a city street bus line running from its metropolitan area to the Boeing Airport under the management of the Seattle Transit Commission, a



Commission consisting of three people appointed by the Mayor of said City, and this city street bus line operates on an established time schedule over the city streets on a fixed route.

## XVI.

All of said vehicles, including the said eleven-passenger limousine, are licensed as "for hire" vehicles under the laws of the State of Washington, as defined in Section 6312-1, et seq., Remington's Revised Statutes of Washington, and operate as "for hire" vehicles in the City of Seattle under Ordinance No. 59866.

## XVII.

Prior to October 10, 1941, the plaintiffs' established one-way fare was \$.75 between the designated places of departure in the metropolitan area and the Boeing Airport, and the same one-way fare was charged between the airport and the metropolitan area. On October 10, 1941, the plaintiffs started collecting \$.80 per passenger. Section 3469 of the Internal Revenue Code, as added by Section 554 of the Revenue Act of 1941, imposing a transportation tax of 5 per cent, became effective on said date. The plaintiffs, starting November 1, 1942, through November 21, 1942, collected \$.84 per passenger. The tax rate was increased by Section 609 of the Revenue Act of 1942 to 10 per cent, effective on said November 1, 1942. On November 22, 1942, plaintiffs started collecting \$.85 per passenger until April 1, 1944, and on and after said date began collecting \$.90 per passenger. Section 302(a) of

the Revenue Act of 1943 became effective on said April 1, 1944, and it increased the rate to 15 per cent. From October 10, 1941, to April 1, 1944, the air lines were billed by plaintiffs for \$.75 per passenger carried at the air lines' expense, plus 5 per cent or 10 per cent of the amount billed as a tax, depending upon the tax rate then in effect. On and after April 1, 1944, the air lines were billed by the plaintiffs for \$.78 per passenger carried at the air lines' expense, plus 15 per cent of the amount billed as a transportation tax.

### XVIII.

Plaintiffs furnished their drivers with new schedules of airport fares upon the effective date of each increase mentioned in paragraph XVII. The drivers would collect the fares existing at the time for the transportation from the passengers carried, except passengers carried at the expense of the air lines, and in cases where a passenger would ask what the fare included, a driver himself would tell the passenger it included the tax.

### XIX.

Plaintiffs' drivers turned in the cash collected with their "daily turn-in sheets" to their dispatchers who checked them and prepared a daily operating report, summarizing cash fares, tax, charge fares and tax. Plaintiffs' bookkeeper prepared "monthly summary of daily operating reports."

The cash fares and tax were then entered in the plaintiffs' cash journal. Exhibit A-12 is the cash journal sheet of plaintiffs for October, 1941. The

cash fares and tax were maintained as separate items and the amounts reported in the tax returns filed are the sum of the monthly total collected as taxes on cash fares and the monthly total billed to and collected from the air lines as taxes. The amounts collected as taxes in the cash journal were posted monthly to an account in the plaintiffs' general ledger entitled, "Federal Transportation Tax," Account No. 2020E. The taxes are shown on the plaintiffs' books as an accrued liability account and the taxes collected, as aforesaid, have not been closed into the plaintiffs' profit and loss account nor reported in its income tax liability during any of the period involved.

## XX.

All sums collected from the individual passengers and from the air lines, including the amounts billed and collected as tax, were deposited in the plaintiffs' bank account and the sums paid by plaintiffs to the defendant, as shown by said returns, were paid by checks drawn by plaintiffs on their said bank account.

From the foregoing Findings of Fact, the Court makes the following

### Conclusions of Law

#### I.

That during the period October 10, 1941, through September 30, 1944, the plaintiffs, in transporting passengers in their motor vehicles involved in this action, were operating said vehicles "on an established line" within the meaning of Section 3469

of the Internal Revenue Code (Title 26, U.S.C., Section 3469), and the Regulation promulgated thereunder.

## II.

That the taxes assessed and collected were in all respects legal and in strict accordance with the law.

## III.

The judgment should be entered dismissing plaintiffs' complaint, with costs to the defendant to be taxed by the Court.

Dated this 16th day of June, 1947.

/s/ CHARLES H. LEAVY,  
United States District Judge.

Presented by:

/s/ HARRY SAGER,  
Asst. U. S. Atty.

Approved as to form:

/s/ RANDALL S. JONES,  
Of Attorneys for Plaintiffs.

Plaintiffs object separately and specifically to the failure to include in the above findings each and all of the following facts:

(1) Air line passengers being transported from Boeing Field were carried anywhere within the downtown district (bounded as set forth in finding XII) that they desired to go, and the limousines stopped anywhere within said district, at the request of a passenger, to let such passenger out (Transcript pp. 14, 15, 72, 82 and 95).



(2) There were fifteen or more incoming and fifteen or more outgoing flights each day to and from Boeing Field (Transcript pp. 10, 23 and 34).

(3) When the arrival of a plane was delayed the air line company would notify the plaintiffs' dispatcher of that fact, together with the estimated time of arrival of the delayed plane (Transcript p. 30).

(4) The information given plaintiffs' dispatcher by the air lines governed the departing time of plaintiffs' limousines. No trips were run without such orders from the air lines (Transcript pp. 58, 59 and 85).

(5) Plaintiffs maintained no schedules of the departure of their limousine service (Transcript p. 64), and they did not publish or post for the use or perusal of the general public schedules of the departures of the limousines from the airport or from the pick-up points in the downtown area (Transcript p. 58).

(6) Plaintiffs did not at any time advertise in the paper or by poster or in any manner their limousine service (Transcript p. 55).

(7) The schedules of the air line companies were used by the plaintiffs' dispatcher only for the purpose of planning so as to be able to handle the volume of expected transportation (Transcript p. 86).

(7½) The general public was not conveyed by means of the limousine service (Transcript pp. 56 and 87).



(8) The air line companies had the power to specify the routes of travel, but they did not do so (Transcript pp. 11, 57 and 61).

(9) Air line companies had the power to designate the pick-up points in the downtown area, and these were changed from time to time (Exhibit—contract with United Airlines, Transcript 17, 18, 24, 25, 58 and 61).

(10) No public authority specified any route to be followed by plaintiffs' limousines, and plaintiffs had no certificate of convenience or necessity issued by Washington Department of Public Works or Department of Public Service (Transcript p. 55).

(11) No special facilities were provided at the airport for the limousines in receiving and unloading passengers. They performed this service in front of the administration building just as did the private cars and taxi cabs, but while waiting at the airport the limousines would park in an area reserved for them and taxi cabs (Transcript pp. 18 through 21).

(12) Limousines not in use were stored at plaintiffs' garage located at 8th and Lenora (2109 8th Avenue) Seattle, Washington. Limousines dispatched to Boeing Field to meet incoming planes, in most cases, went from plaintiffs' garage directly to field without going to or stopping at the downtown pick-up points. However, occasionally a car was dispatched from a hotel to meet an incoming plane (Transcript pp. 84, 88).

(13) Although an airplane would be departing at a certain time, if the plaintiffs' dispatcher re-

ceived no call for passengers to be transported to the plane, no limousine would be sent to the airport (Transcript p. 86).

(14) If all the passengers going to Boeing Field were at one downtown pick-up point the limousine would not go to any of the other downtown pick-up points before departing for Boeing Field (Transcript pp. 81, 96, 97).

(15) When Boeing Field was closed down no limousine went there to transport passengers. They went directly to the alternate airport. (Transcript p. 90).

The ground for these objections is as follows:

Each and all of the facts specified in these objections are uncontradicted by opposing evidence. They are included in the facts upon which the Court based its decision in this case, and no proper determination of the question of whether said limousines were being "operated on an established line" can be made without taking into consideration all of these facts along with the other facts set forth in the foregoing findings.

Plaintiff further objects to the conclusions of law on the ground presented to the Trial Court at and during the trial of the above entitled case, namely, that under all of the facts of this case the plaintiffs were not operating their said limousines on an established line within the meaning of Section 3469 of the Internal Revenue Code.

/s/ RANDALL S. JONES,

Of Counsel for Plaintiffs.

[Endorsed]: Filed June 16, 1947.

In the District Court of the United States for the  
Western District of Washington, Southern  
Division

Civil No. 876

E. ROYCE, B. ROYCE, and A. H. WENCK,  
d/b/a GRAY LINE TOURS,

Plaintiffs,

vs.

CLARK SQUIRE, United States Collector of In-  
ternal Revenue for the District of Washington,  
Defendant.

### JUDGMENT

The above-entitled cause came on regularly for trial on the 1st day of May, 1947, before the above-entitled Court, Honorable Charles H. Leavy presiding therein, sitting without a jury, plaintiffs appearing by their attorneys, Robert T. Jacob, Esq., Randall S. Jones, Esq., and Joseph E. Gandy, Esq., being represented in Court by Randall S. Jones, Esq., and defendant appearing by his attorneys, J. Charles Dennis, United States Attorney for the Western District of Washington, Harry Sager, Assistant United States Attorney for said District, and Thomas R. Winter, Special Assistant to the Chief Counsel, Bureau of Internal Revenue, being represented in Court by Thomas R. Winter, and the Court having signed and entered an order on the pre-trial hearing and witnesses having been

sworn and having testified, exhibits introduced in evidence, oral argument by counsel, and the Court having rendered an oral opinion and the Court having made and entered its Findings of Fact and Conclusions of Law herein, now, therefore, it is hereby

Ordered, Adjudged and Decreed that the plaintiffs' complaint be, and the same is, hereby dismissed with prejudice, with costs to the defendant to be taxed by the Clerk.

Dated this 16th day of June, 1947.

/s/ CHARLES H. LEAVY,  
United States District Judge.

Presented by:

/s/ HARRY SAGER,  
Asst. U. S. Atty.

Approved as to form:

/s/ RANDALL S. JONES,  
Attorney for Plaintiffs.

[Endorsed]: Filed June 16, 1947.

[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice is hereby given that E. Royce, B. Royce and A. H. Wenck, d/b/a Gray Line Tours, plaintiffs above named, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 16th day of June, 1947, and from the whole of said judgment, which judgment dismissed the plaintiff's complaint with prejudice and with costs to the defendant to be taxed by the Clerk.

Dated, August 22, 1947.

/s/ R. T. JACOB,

/s/ RANDALL S. JONES,

Attorneys for the appellants,

E. Royce, B. Royce and

A. H. Wenck.

State of Washington,

County of King—ss.

Due service of the foregoing Notice of Appeal to the United States Circuit Court of Appeals for the Ninth Circuit is hereby accepted at Seattle, Washington, this 22nd day of August, 1947, by receiving a copy thereof, duly certified as such by Randall S. Jones, of attorneys for plaintiffs.

/s/ THOMAS R. WINTER,

Of Counsel for defendant.

Copy of the within and foregoing Notice of Appeal delivered to U. S. Attorney, Tacoma, and to



Thos. R. Winter, attorney for U. S. Int. Rev. Bureau, at Seattle, this 23rd day of August, 1947.

/s/ E. E. REDMAYNE,

Deputy Clerk.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Aug. 22, 1947. Millard P. Thomas, Clerk. By E. R., Deputy.

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[Title of District Court and Cause.]

### BOND ON APPEAL

Know All Men by These Presents, that E. Royce, B. Royce and A. H. Wenck, doing business under the firm name and style of Gray Lines Tours, as Principals, and the Saint Paul-Mercury Indemnity Company of Saint Paul, a corporation, organized and existing under the laws of the State of Delaware, and authorized to do business under the laws of the State of Washington as a surety company, as surety, are held and firmly bound unto the above named Clark Squire, United States Collector of Internal Revenue for the District of Washington, in the sum of Two Hundred Fifty and no/100 (\$250.00) Dollars, to be paid to the said Clark Squire, his personal representative or assigns, for the payment of which well and truly to be made, we bind ourselves, our heirs, personal representatives, successors and assigns, jointly and severally, firmly by these presents.

Whereas on the 16th day of June, 1947, a judg-

ment was entered in the above entitled Court and cause dismissing with prejudice the complaint of the plaintiffs, E. Royce, B. Royce and A. H. Wenck; and said plaintiffs feeling aggrieved by said judgment are appealing therefrom to the United States Circuit Court of Appeals for the Ninth Circuit.

Now, Therefore, the condition of this obligation is such, that if the said E. Royce, B. Royce and A. H. Wenck, as appellants, shall pay all costs awarded and/or taxed against them if this appeal is dismissed or said judgment is affirmed, or shall pay all such costs as the appellate court may award against them if the judgment is modified, then this obligation to be void; otherwise to remain in full force and effect.

In Witness Whereof, the principals have caused these presents to be executed this 22nd day of August, 1947, and the surety has caused these presents to be executed on said day by its duly authorized representative and its corporate seal to be affixed thereto.

E. ROYCE, B. ROYCE and

A. H. WENCK, d/b/a

GRAY LINE TOURS,

By /s/ A. H. WENCK,

Principal.

SAINT PAUL-MERCURY

INDEMNITY COMPANY,

[Seal]

By /s/ W. A. WILLIAMS,

Attorney-in-Fact,

Surety.

State of Washington,  
County of King—ss.

Due service of the foregoing Bond on Appeal to the Circuit Court of Appeals for the Ninth Circuit is hereby accepted at Seattle, Washington, this 22nd day of August, 1947, by receiving a copy thereof, duly certified as such by Randall S. Jones of attorneys for the plaintiff.

/s/ THOMAS R. WINTER,

Of Counsel for Defendant.

[Endorsed]: Filed Aug. 22, 1947.

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[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH  
APPELLANTS INTEND TO RELY

The above-named plaintiffs and appellants intend to rely on the following points on their appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit:

1. The findings of fact are incomplete in that they do not include material and ultimate facts clearly established by the evidence, and they do not cover all the material issues in the case, and the trial court erred in failing to include such facts and to cover such issues in the findings of fact.

2. The trial court erred in failing to include in its findings of fact each and all of the facts set forth in the plaintiff's objections appended to said findings of fact, all of which facts are established by the evidence and are essential to a proper determination of this case.

3. The trial court erred in deciding and finding

(Conclusion of Law I, being regarded as a finding of ultimate fact) that plaintiffs in transporting passengers in their motor vehicles involved in this action were operating the same "on an established line" within the meaning of Section 3469 of the Internal Revenue Code and Regulations promulgated thereunder in that the evidence clearly shows plaintiffs were not operating their said motor vehicles "on an established line" within the meaning of said Code section; and said decision and finding are not supported by the evidence and are contrary to the evidence and contrary to the law governing this case.

4. The trial court erred in making each and all of its conclusions of law in that they are each contrary to the evidence and contrary to the law governing this case.

5. The trial court erred in admitting defendant's Exhibit No. A-1 over the plaintiff's objection for the reasons set forth on page 16 of the Reporter's Transcript of Proceedings of the trial.

6. The trial court erred in treating Bureau of Internal Revenue Regulations 42, Section 130.58, as though it had the force and effect of law.

7. The trial court erred in rendering judgment dismissing the plaintiffs' complaint with prejudice in that the evidence is insufficient to support said judgment and it is contrary to the evidence and contrary to the law governing this case.

Dated this 22nd day of August, 1947.

/s/ RANDALL S. JONES,

Of Attorneys for Plaintiffs  
and Appellants.

State of Washington,  
County of King—ss.

Due service of the foregoing Statement of Points on Which Appellants Intend to Rely is hereby accepted at Seattle, Washington, this 22nd day of August, 1947, by receiving a copy thereof, duly certified as such by Randall S. Jones, of attorneys for the plaintiffs.

/s/ THOMAS R. WINTER,  
Of Counsel for Defendant.

[Endorsed]: Filed Aug. 22, 1947.

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[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD  
ON APPEAL

The plaintiffs and appellants hereby designate the following portions of the record, proceedings and evidence in this case to be contained in the record on appeal of this cause to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit:

1. Complaint.
2. Order of April 24, 1946, transferring case from Northern to Southern Division of the District Court of the United States for the Western District of Washington.
3. Answer.
4. Order on Pre-Trial hearing.



5. All of reporter's stenographic transcript of proceedings of trial, including the testimony of all of the witnesses.

6. All of the exhibits admitted in evidence at the trial.

7. Findings of Fact and Conclusions of Law with plaintiffs' objections to the same appended thereto.

8. Judgment, with notation of docket entry thereof.

9. Notice of Appeal to the United States Circuit of Appeals for the Ninth Circuit, with acceptance of service and date of filing.

10. Bond on Appeal, with acceptance of service and date of filing.

11. Statement of Points on which appellants intend to rely on appeal, with acceptance of service and date of filing.

12. This Designation of the Contents of the Record on Appeal with acceptance of service and date of filing.

13. Order to send original exhibits to the clerk of said appellate court with and as part of the record on appeal.

Dated this 22nd day of August, 1947.

/s/ RANDALL S. JONES,

Of Attorneys for Plaintiffs  
and Appellants.

State of Washington,  
County of King—ss.

Due service of the foregoing Designation of Contents of Record on Appeal to the United States Circuit Court of Appeals for the Ninth Circuit is hereby accepted at Seattle, Washington, this 22nd day of August, 1947, by receiving a copy thereof, duly certified as such by Randall S. Jones, of attorneys for the plaintiffs.

/s/ THOMAS R. WINTER,

Of Counsel for Defendant.

[Endorsed]: Filed Aug. 22, 1947.

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[Title of District Court and Cause.]

### ORDER

Upon motion of the plaintiffs-appellants herein, by Randall S. Jones of their attorneys, and upon good cause being shown therefor,

It Is Ordered that the clerk of this Court be and he is hereby authorized and directed to send to the clerk of the United States Circuit Court of Appeals for the Ninth Circuit with and as a part of the record on appeal in this cause all of the original exhibits introduced in evidence at the trial of the above-entitled action, and

It Is Further Ordered that said original exhibits need not be copied into the record on appeal, and that said exhibits are to be sent to the clerk of said appellate court with the request that he safely keep and return the same to the clerk of this court upon final determination of this cause in the appellate court.

Dated at Tacoma, Washington, this 25th day of August, 1947.

/s/ CHARLES H. LEAVY,  
U. S. District Judge.

Requested by:

RANDALL S. JONES,  
Of Counsel for Plaintiffs.

Approved:

THOMAS R. WINTER,  
Of Counsel for Defendant.

[Endorsed]: Filed Aug. 25, 1947.

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[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO RECORD  
ON APPEAL

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing transcript, consisting of pages numbered 1 to 42, inclusive, together with the original Transcript of Proceedings, consisting of pages numbered 1 to 128, inclusive, and Plaintiffs' original exhibits, numbered 1 to 6, inclusive, and Defendant's original exhibits, numbered A-1 to A-10, inclusive, is a full, true and correct record of so much of the papers and proceedings in Cause No. 876, E. Royce, B. Royce and A. H. Wenck, dba Gray Line Tours, Plaintiffs, vs. Clark Squire, United States Collector of Internal Revenue for the District of Washington, Defendant, as required by Plaintiffs-Appellants'

Designation of the Contents of the Record on Appeal, on file and of record in my office at Tacoma, Washington, and the same constitute the Transcript of the Record on Appeal from the Judgment of the District Court of the United States for the Western District of Washington, Southern Division, to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the original Transcript of Proceedings and the original exhibits above-mentioned have this day been transmitted to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a full, true and correct statement of all expenses, fees and charges earned by me in the preparation and certification of the aforesaid Transcript of the Record on Appeal, to-wit:

Appeal fee.....	\$ 5.00
Clerk's fee for preparation of	
Record on Appeal.....	5.30
	<hr/>
	\$10.30

and I further certify that the said fees, above set out, have been paid in full.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court, in the City of Tacoma, in the Western District of Washington, this 20th day of September, 1947.

[Seal]                      MILLARD P. THOMAS,  
Clerk.

By /s/ E. E. REDMAYNE,  
Deputy.

In the District Court of the United States for the  
Western District of Washington, Southern  
Division

No. 876

E. ROYCE, B. ROYCE, and A. H. WENCK,  
d/b/a Gray Line Tours,

Plaintiffs,

vs.

CLARK SQUIRE, United States Collector of In-  
ternal Revenue for the District of Washington,  
Defendant.

### TRANSCRIPT OF PROCEEDINGS

Be It Remembered that on the 1st day of May, 1947, at the hour of 10:00 o'clock a.m., the above entitled and numbered cause came on for trial before the Honorable Charles H. Leavy, one of the judges of the above entitled court, sitting in the District Court of the United States at Tacoma, Pierce County, Washington; the plaintiffs appearing by Messrs. Randall S. Jones and Robert T. Jacob, and the defendant appearing by Thomas R. Winter, Special Assistant to the Chief Counsel, Bureau of Internal Revenue.

Whereupon the following proceedings were had and done, to-wit: [1\*]

The Court: We will proceed with the call of the calendar.

Docket 876, E. Royce and others versus Clark Squire. Are the parties ready to proceed now?

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\* Page numbering appearing at foot of page of Reporter's certified Transcript of Record.



Mr. Winter: The defendant is ready, your Honor.

Mr. Jones: Yes, your Honor.

The Court: I have not signed the pretrial order.

Mr. Winter: If the Court please, before your Honor does sign the pretrial order, I have a matter to bring up with the Court in that connection. It was briefly mentioned to your Honor at Seattle, when the pretrial order was presented to your Honor. As was explained to the Court, subsequent to the preparation and signing of the pretrial order it was discovered by counsel for the defendant and counsel for the plaintiff that for some considerable period during the time involved in the assessment and collection of this tax, the Gray Line Tours was a corporation, duly organized and existing under the laws of the State of Washington, and for several months, at least, returns were prepared and apparently the tax was paid by that corporation. Now the plaintiffs are suing here as a partnership, doing business as the Gray Line Tours.

The pretrial order will have to be amended and we ask leave to amend it to show, in accordance with the exhibits—and I didn't have copies of the exhibits, that during the date—or during the months which those returns were prepared and filed by the corporation, that the plaintiffs did not file their returns, nor did they pay the tax during that period, but that returns were filed by the corporation and who has not filed a claim for refund in this case. However, if counsel will stipulate, or is it a fact, Mr. Wenck, who is the president—who I

think was one of the officers of that corporation is here, and it's my understanding that the plaintiffs were the liquidating trustees of this corporation; that all of the assets and liabilities of the corporation were taken over by the partnership, including the assumption of any contracts, or any obligations under contracts, and all other assets of the corporation were turned over to these plaintiffs, and therefore they would, as a matter of right, be entitled to file a claim for refund if such were the allegations and maintain this action, as by operation of law having assumed those obligations and not being an assigned claim. Now, if it is so understood—in other words, we would be confronted if we don't have a stipulation or agreement from the corporation and the duly authorized officers, they could then bring a suit later on and say that they paid the tax— [3] or the liquidating trustees could.

Mr. Jones: That's agreeable.

Mr. Winter: So it is understood then, that the assets as I stated, were transferred to these individuals.

Mr. Jones: That's agreeable.

Mr. Winter: Then with that understanding I think the order may be considered as amended to conform with those.

The Court: It will be so considered. Of course the order itself is, I think, silent on that particular matter, is it not?

Mr. Winter: Yes, your Honor. If your Honor would prefer that the——

The Court: Well the order does not recite to the contrary either, does it?

Mr. Winter: No, that's right, except the order recites that we admit that the plaintiffs paid it; that the only amendment that would be necessary in that regard, that the plaintiffs' predecessor corporation paid it, and the plaintiffs on behalf—filed their claims for—they were authorized by law to file their claims for that tax which was paid, having assumed the liabilities and also having acquired all of the assets and rights and title and interest in the property. [4]

The Court: Well, on February 28, 1942, was it a corporation?

Mr. Winter: On February 28, '42?

The Court: Yes.

Mr. Jones: It was early in '42, your Honor, I think.

Mr. Winter: No, the return for October '41 was filed by the corporation. The return for November '41 was filed by the corporation. The return for December '41 was filed by the corporation. The return for January '42 was filed by the corporation. The return for February 1942—for March 1942 was filed by the corporation. The return for April, 1942, was filed by the corporation. The return for May, 1942, was filed by Gray Line Tours, without indicating the corporation setup. In other words, on the first return on that month struck out from the printed part, showing the name Gray Line Tours, the words "I-n-c." The name was changed appar-

ently from Gray Line Tours, Inc., as a corporation to Gray Line Tours, which has been the allegation all through the complaint.

The Court: And this sum of \$16,423.51 includes——

Mr. Winter: Both papers.

The Court: Both returns.

Mr. Winter: Yes. [5]

The Court: And do these pretrial exhibits 1, 2, and 3 show what you have just proposed?

Mr. Winter: Yes, Your Honor.

The Court: In your stipulation?

Mr. Winter: Yes, Your Honor. I was reading from exhibits. Its exhibit—I was reading from exhibit 1 and 2.

The Court: I think the oral stipulation modifying—or rather expanding the written pretrial order will be sufficient without any formal——

Mr. Winter: Very well.

The Court: I make that statement because Paragraph IV fixes pretrial exhibits 1, 2, and 3 as the basis for the recovery in the sum that is sought here——

Mr. Winter: Yes.

*The Court:* And that would cover both periods. There is, in that connection, while it might be confusing to Your Honor, Exhibit 3 will show a few hundred dollars more payment sought to be recovered, but we have admitted the amount which they have claimed, and so that will be immaterial, except——

Mr. Jones: That is right.



The Court: Very well, with that understanding I will sign this pretrial order, and for the purposes of this case the exhibits will be identified as they are [6] in the pretrial order, as agreed exhibits rather than exhibits for the plaintiffs or exhibits for the defendant.

Mr. Jones: Very well.

Mr. Winter: We, on the part of the defendant, we will offer those exhibits if necessary, and except as to—reserving objection to the materiality of any exhibit they are offering.

Mr. Jones: Well I had the thought that there were certain exhibits that were essential to my case, and that I would offer those that were—and there are two or three that I feel that I should object to that the defendant wishes of offer, and at the close of my opening statement I will offer the exhibits.

The Court: Well, if there is any disagreement as to the exhibits at all, they will be identified in the progress of the trial as exhibits for plaintiffs and exhibits for defendant, identified in the pretrial order by the reference given there, one, two, three, four, or five for the purpose of the trial and this record, they will be identified regularly as they would if there were no pretrial order, because I take it from what has just been stated, there may be some of them that would be rejected and would not be a part of the record.

(Whereupon opening statements by counsel.)



## A. S. DIBBLE

produced as a witness on behalf of the Plaintiffs, after being first duly sworn, was examined and testified as follows:

## Direct Examination

By Mr. Jones

Q. Mr. Dibble, will you state your name in full for the record.?

A. The initials are A. S. Dibble, D-i-b-b-l-e.

Q. With whom are you employed?

A. With United Airlines.

Q. How long have you been employed with the United Airlines?      A. Eleven years.

Q. How long have you been employed in the City of Seattle?      A. Four years.

Q. Then it is true that you are employed in Seattle?      A. Yes, sir.

Q. And what is your position in Seattle?

A. Passenger Service Manager.

Q. And have you had that position all the four years?      A. Yes, sir.

Q. Would you explain to what extent that position of yours and your duties, has to do with the supervision of the—making arrangements for your airplane passengers to use [8] limousine service?

A. Well, I am responsible for the supervision and maintaining—maintenance of the ground transportation service—that is, to maintenance of the standards that we want to maintain.

(Testimony of A. S. Dibble.)

Q. Can you—

The Court: Just a moment. Do I understand you are working for both the City of Seattle and for the airlines?

The Witness: No, sir. It is simply my responsibility to see that all passengers are provided—

The Court: Well, are you an employee of the City of Seattle?

The Witness: No, sir, I am employed by United Airlines.

Q. Can you give, or have you any information as to approximately what percentage of your flights out of Boeing Field are delayed by weather conditions?

A. It would be fifteen to twenty percent.

Q. Can you give any indication of how many flights from, or landings upon fields other than Boeing are made because of either weather conditions or because Boeing Field for some reason is not available?

A. Approximately five percent of our flights that have to use other airports.

Q. Would that be true during the time that you started to work there up until September the 30th, 1944.

A. Well, I came to Seattle in 1943.

Q. Yes, but from that time on to September 30th, '44, would the figures that you gave be true?

A. I would say possibly a higher percentage, because during that period we were restricted from Boeing Field by the Army and used Paine Field for a period of three or four months.

(Testimony of A. S. Dibble.)

Q. Approximately how many flights a day did you have coming in to, and landing at Boeing Field in recent years?

A. Approximately ten departures and ten arrivals a day.

Q. Have you any information as to approximately what portion of your incoming and outgoing airline passengers use limousine service in going to and from the field?

A. I would say about fifty percent of them.

Q. During the war was there a higher or lower—

A. A higher percent during the war.

Q. Used the——

A. Used the limousine.

Mr. Jones: You may cross examine. [10]

### Cross Examination

By Mr. Winter:

Q. You say you went—you came to Seattle about 1943, Mr. Dibble?

A. That's correct, yes, sir.

Q. And you were the ground transportation manager for United?

A. No, my title is passenger service manager. Ground transportation comes under the passenger service.

Q. And that is the position you occupied when you first came here?      A. Yes, sir.

Q. And you still occupy that position?

A. That is correct, yes, sir.

Q. Did you—were you familiar with the—any

(Testimony of A. S. Dibble.)

existing contracts between the plaintiffs, the Gray Line Tours, and the United?

A. I knew that there was a contract.

Q. Did your company designate any routes that the Gray Lines would use meeting your airplane schedule of flights?

A. No, we have the privilege. While I have been here I have had no occasion to designate routes.

Q. Well, you used the limousine service yourself personally, from time to time during that period?

A. Yes, I do, sir. [11]

Q. Will you tell the Court approximately what percent of the time they used the same route, going from Boeing to town on incoming flights and on the outgoing flights?

A. My own experience, you mean?

Q. Yes.

A. I would say about fifty percent—about half the time they would use one route and half the time another.

Q. That depended upon—

A. Traffic.

Q. Traffic?

A. That's correct, yes, sir.

Q. Of course, during the war there was considerable traffic and they took the most direct route they could possibly get with the least traffic, is that right?

A. Traffic certainly had a bearing on what route they would use.

Q. May I see Exhibit 14, please? Under the arrangement with the plaintiffs, Gray Line Tours—well, strike that. Who was Mr. J. R. Wanink, W-a-n-i-n-k, do you know?

(Testimony of A. S. Dibble.)

A. Yes, he is the chief passenger agent for the United Airlines.

Q. United Airlines? A. That's right.

Q. Did you receive instructions from him with regard to the route to be taken by the limousines from Gray Line Tours? [12]

A. No, sir. Mr. Wanink is my subordinate.

Q. Your subordinate? A. Yes.

Q. Well, did he make arrangements with the plaintiffs as to the route which they should take?

A. No.

Q. I will show you what has been marked for—exhibit for identification Exhibit 14.

The Court: What is it, the pretrial order?

Mr. Jones: Yes, I had it here. It had my own markings on it.

Mr. Winter I can loan you a copy.

Mr. Jones: I would like to borrow it.

The Court: You may proceed, Mr. Winter.

Q. Have you examined that exhibit, Mr. Dibble?

A. I have read it, yes, sir.

Q. Did you receive a copy of that?

A. I'm sure it must be in my files, yes.

Q. That refers to instructions for direct routes that the airline service is to follow, doesn't it?

A. Well, it refers to routes. It is my opinion that its our general office.

Q. And that was the understanding of United that those routes at that time were being followed, does it?

A. Yes, at that time I think that's correct.



(Testimony of A. S. Dibble.)

Q. What route was being followed that you call, at about that time?

A. Well, from my experience it was optional,—that is, in the riding myself, the driver had the option of using either Fourth Avenue or Airport Way.

Q. Well, what did you understand when you received this communication from one of the other officers of the company, what did you understand that it meant, Exhibit 14?

A. Well, sir, it has been four years—almost four years since it has been received and I receive a considerable amount of correspondence and I don't recall the impression at the time.

Q. Well, isn't it a fact that the limousine when enroute from the airport to the city of Seattle usually took Airport Way, or highway US 99 to about Dearborn Street? Wasn't that the usual route that they took?

A. I think it was customary.

Q. Yes. Then go to—then the bus, or the limousine would go to any hotel designated in a certain area, previously designated in a certain area by either the United or the Gray Lines, isn't that right.

A. They would make any stop within the area.

Q. In a given area?

A. Not restricted to hotels. [14]

Q. The airlines never advised any passengers that they would take them beyond that area?

A. No.

(Testimony of A. S. Dibble.)

Q. As a matter of fact, they advised them that they wouldn't go beyond that area in that limousine service, is that right, or those designated places?

A. The stops were not designated.

Q. Yes, you have—well, under your understanding with the plaintiffs, you had designated hotels which they could leave?

A. From which they would leave.

Q. Yes, to Boeing on the outgoing flights?

A. Yes.

Q. And passengers were only picked up at those designated hotels or places? A. That's right.

Q. And that same procedure, the same routes and everything were taken by the eleven-passenger limousines in their service?

A. That's right.

Q. They didn't follow any different procedure since they acquired the eleven-passenger machines than they did with their seven-passenger limousines?

A. No, that's correct. [15]

Mr. Winter: I think that's all.

Mr. Jones: Just one question.

Mr. Winter: Excuse me, we will offer it in evidence, if the Court please.

The Court: It will be remarked then.

Mr. Winter: Well, I will wait and offer it later, if the Court please. It will be better—

The Court: No, you could offer it now. It could be marked A-1.

Mr. Winter: Defendant's Exhibit A-1.

Mr. Jones: This Exhibit A-1 we object to on the grounds that it is irrelevant and incompetent

(Testimony of A. S. Dibble.)

and immaterial; on the further ground that it supports to be an airline inter-company communication. No evidence has been shown that it was ever brought to the attention of the plaintiffs or that they ever had any knowledge of it, or that it was intended for them to act upon, and on those grounds we object to it.

The Court: Did you save an objection in the pretrial—

Mr. Jones: General objection, if the Court please, on page 10, subject to any and all other objections, the general objections. Also on the ground that it is hearsay as far as the plaintiffs are concerned. [16]

The Court: What exhibit is that in your pre-trial?

Mr. Jones: Exhibit 14, Your Honor.

The Court: The objection will be overruled and an exception allowed.

Mr. Jones: That's all.

Mr. Winter: I'll ask a question.

Q. Who designated the pickup points in the downtown business district of Seattle, which one of the companies designated?

A. Each company will designate their own pickup points.

Q. Well, I mean as between yourself and the Gray Line—who did the designating of where the airline passengers would be picked up?

A. The airline designates.

Mr. Winter: That's all.

(Testimony of A. S. Dibble.)

Redirect Examination

By Mr. Jones:

Q. That was after a conference with the United—I mean with Gray Line Tours, was it?

A. No.

Q. Well, you discussed it with them—I mean the officers of the United discussed with them the new pickup points, wouldn't they. [17]

A. We would tell them where we wanted the passengers picked up.

Q. And did they ever object to any pickup points?

A. Not to my knowledge, no.

Q. You assumed that it was satisfactory to them?

A. I think so.

Q. You had an understanding that there would only be two or three within a certain area, didn't you, in your contract?

A. The number of pickup points wasn't specified.

Q. They weren't in the written contract?

A. According to my recollection, I'm not——

Q. Well, there never were more than two or possibly three pickup points going out, were there?

A. At the time I've been there, there haven't been more than three.

Mr. Winter: More than three. That's all.

The Court: I want to ask you a question, as to what were the arrangements, if any, concerning these limousines at the field for the—for their parking and for their receiving passengers and for their

(Testimony of A. S. Dibble.)

unloading passengers, was any distinction made between them and some private individual or some taxicab that drove down there? [18]

The Witness: No, absolutely.

The Court: They had no special facilities provided, where they would park to the exclusion of the general public when they were waiting for an incoming plane?

The Witness: Recently there has been a parking area reserved for them—cabs and limousines.

The Court: How recently was that, with—

The Witness: I'd say within a year.

The Court: Subsequent to the time involved in this trial. That's all.

Mr. Winter: Mr. Dibble, I want to ask you one further question.

#### Recross-Examination

By Mr. Winter:

Q. These limousines only carry the passengers which had previously booked flight on a specific flight did they not?

A. That's right.

Q. There were other means of transportation down there if people wanted to go to the airport, but they could use these limousines, couldn't they?

A. I'm sorry, I—

Q. I say, there was other transportation down to the airport. There's city streetcars, a bus line down there, isn't there? And the taxicabs frequently brought people to the airport?

A. Yes, sir.



(Testimony of A. S. Dibble.)

Q. And took them from the airport. Now, isn't it a fact that all of the limousines have since 19—since 1943, had a place in front of the airport where they were—they pulled up and signs were placed there showing that they were either United bus or a Northwest bus limousine?

A. According to my recollection there, it was designated a taxi zone.

Q. A taxi zone?           A. Yes, sir.

Q. They would use the taxi zone. Where would they park during the time they were waiting for an incoming flight? Did they go to the public zone, around the public parking places?

A. No, there was an area removed from the buildings for taxis and limousines.

Q. Right in front of the building?

A. Yes.

Q. In the entrance?

A. That's right, in front of the building, but not in front of the entrance, no. [20]

Q. Well, just a little aside of the entrance?

A. Yes.

Q. And that is where the baggage from the plane is delivered to the limousines?

A. The baggage is delivered at the entrance.

Q. Yes, well, they have a special place there with—roped off with wire, I think, or chained off for the baggage to be delivered to them?

A. Yes, that's correct.

Q. And the airlines pull up to the side of that?

A. Yes, sir.

(Testimony of A. S. Dibble.)

Q. To the side of that place, and the general public can't drive up there in their cars, can they? Except, to the entrance to unload and load?

A. That's right.

Q. But not at this place where the limousines load and unload? A. No.

Mr. Winter: That's all.

Mr. Jones: That's all.

The Court: We will take an intermission now for ten minutes.

(Recess.)

### GEORGE E. HARRISON

produced as a witness on behalf of the Plaintiffs, after being first duly sworn was examined and testified as follows:

#### Direct Examination

By Mr. Jones:

Q. Would you state your name in full to the Reporter?

A. George E. Harrison.

Q. Your home? A. Seattle.

Q. What's your occupation?

A. Station manager, Northwest Airlines.

Q. How long have you held that job?

A. Approximately in Seattle about four and a half years.

Q. All the time has it been the same position?

A. Yes, the same.

Q. Have you worked there then, prior to September 30th, 1944.

(Testimony of George E. Harrison.)

A. Yes, I went to Seattle in January of '43.

Q. And have been in this position since?

A. Yes, sir.

Q. Would you briefly state whether or not your duties have anything to do with limousine service to and from that airport?

A. Only in regard to the handling from the airport [22] downtown—that is, supervising the personnel who order the transportation, and see that the passengers are dispatched and so on.

Q. What was the number—approximate percentage of flights that had to be cancelled that your company had during the period of time October 10, 1941, if you know that far back, if not, from 1943 on to September 30th of 1944—what percentage of flights were postponed due to the weather conditions there?

A. You mean the weather——

Q. Just in—relate——

A. Approximately five to ten percent, I would say.

Q. I beg your pardon?

A. Five to ten percent.

Q. How many flights a day did your company have prior to September 30th, 1944?

A. Well, when I came to Seattle there were only two trips a day; within two or three months thereafter we had another one, and shortly thereafter another one, so by the fall of '43, to the best of my recollection we had five in and five out—four or five.

(Testimony of George E. Harrison.)

Q. Four or five take-offs and landings?

A. Well, that would be a total of ten each day.

Q. Now, were there any times——

Mr. Winter: Mr. Jones, the number [23] of flights and schedules were a pretrial exhibit, the amount of tax charged, and everything. I don't want to object, but——

Mr. Jones: Well, this is in my own case, so whatever——

The Court: Well of course where you have stipulated as to certain facts it is unnecessary to make proof on that fact. It just encumbers the record.

Mr. Jones: All right.

Q. Well, were there times when you couldn't use Boeing Field? A. Yes, sir.

Q. What—have you any idea what percentage of your flights took off from fields other than Boeing?

A. Well, I guess maybe five—five percent—ten percent.

Q. Have you any way to check or give us an estimate on the approximate number of your air transportation passengers who used the limousine service?

A. Fifty to sixty percent is the best estimate.

Q. Who designated the pickup points for your company in the down town Seattle area?

Mr. Winter: If he knows.

Q. If you know.

A. They were designated by our district traffic manager in [24] conjunction with — consultation with us at the airport.

Q. With who?

A. With us at the airport.

Q. Oh.

A. We would discuss it and agree on where the pickups would be made.

Mr. Jones: You may cross examine.

### Cross-Examination

By Mr. Winter:

Q. Of course, you don't know what discussion the traffic manager had with the Gray Line Tours prior—with respect to the pickup stops, do you?

A. You mean prior to my coming to Seattle?

Q. Prior to their talking to you out at the airport?

A. I think so, sir.

Q. Were you with them when they had their discussion, if any?

A. Well, we talked about them before we would contact the Gray Lines.

Q. And then you would discuss them with the Gray Lines?      A. Yes, sir.

Q. And if it was satisfactory with them, and they—the points were established, is that right?

A. Yes, sir.

Q. You were limited to a certain area within which you could [25] designate pickup points.

A. Pickup points in the down town area, yes sir.

Q. And you—as a matter of fact, you advised all passengers that they were limited in the outgoing trips to a certain area to let passengers off?

A. In the down town Seattle area, yes, sir.



(Testimony of George E. Harrison.)

Q. Where was the main pickup point in Seattle, the Olympic Hotel, in the down town area?

A. I don't know that you would call it necessarily a main one. There were about two or three at different times.

Q. Well, a very large majority of passengers did use that place of departure, is that right?

A. At the Olympic?

Q. Yes. A. Yes, sir.

Q. As a matter of fact, about seventy-five percent, wasn't it?

A. That sounds reasonable, yes.

Q. And then you had sometime ago—no, wait a minute. You're with the Northwest?

A. Northwest, yes, sir.

Q. You have an office in the Olympic Hotel building? A. Yes, sir.

Q. And that is one of the points of departure for these [26] passengers? A. Yes, sir.

Q. Do you have anything to do with the paying of the transportation of passengers on cancelled flights?

A. That was handled by the agent either at the down town office, or at the airport.

Q. I see. You would give them a—did you give any statement to the Gray Lines as to cancellations or anything of that nature?

A. We'd give them an order.

Q. And did you make any charge to the passengers when—for any transportation at any time on these airline services?

A. Did we charge the passengers?

(Testimony of George E. Harrison.)

Q. Yes, at any time, yes.

The Court: You mean for the limousine service?

Mr. Winter: Yes, for the limousine service.

A. No, we don't charge them for that.

Q. On these five to ten percent of the flights which were used—where you used airports other than the Boeing Field, who paid the cost of transportation for the passengers on those flights, do you know?

A. The inbound transportation would be paid by Northwest Airlines. [27]

Q. And what about the outbound?

A. Well, if we used the Seattle-Tacoma Airport, the passengers would pay the normal fare of their outgoing trip.

Q. And would you reimburse the Gray Lines for any additional?

A. For the additional fare.

Q. You published schedules of your flights?

A. Yes, sir.

Q. I mean, regular time schedules?

A. Oh, yes.

Q. And those flights were scheduled to depart and arrive on those times? A. Yes, they—

Q. And when you say that five or ten percent of the flights were delayed, that was because of weather conditions?

A. Well, a combination of weather and other conditions.

Q. Yes. It was always your purpose to have the flights go out on schedule? A. Yes, sir

(Testimony of George E. Harrison.)

Q. And so far as humanly possible they did go out on schedule, depending on conditions?

A. Oh, yes.

Q. And all the other flights the other ninety-five percent [28] of the time they did go out on schedule and arrive on schedule?

A. Well, I don't know about the arrival on schedule; they departed on schedule.

Q. The limousines were always furnished for the particular flight and were out there to take the passengers that came in on an incoming flight, is that right?

A. According to our orders, yes.

Q. And you published the fares on the limousine service for the ground service?

A. That's in our public transportation, yes, sir.

Q. And you showed as an item the tax included upon those fares, didn't you?

A. I don't—yes, I believe it includes the tax.

Q. And if you were ever—its your experience if you were ever advised by a passenger that it was so much fare plus tax,—I mean, if they ever asked you what the fare was you told them it included tax, if they asked you, didn't you?

Mr. Jones: Now just a second. I have sat here and let you go a long way beyond the direct examination. If Mr. Winter wishes to make this witness his own we have no objection, but I think the cross examination has greatly exceeded the direct.

The Court: Let's proceed. [29]

(Testimony of George E. Harrison.)

Q. Did you ever use the limousine service yourself?

A. I don't think I've used it more than twice in the last four years, sir.

Q. Was that on schedules which you were going to meet or on ingoing or outgoing, on planes, or something of that nature?

A. One time I was going. The time that I recall I was going from town to the airport in a limousine carrying another airlines passenger. I just happened to be available to go at that time.

Q. Would you pay your transportation for that trip?

A. Yes, I paid transportation for that trip out to the airport.

Q. Yourself, personally? A. Yes.

Mr. Winter: I think that's all.

The Court: What was your practice when an incoming plane was greatly delayed?

The Witness: We would—you mean as far as providing transportation?

The Court: Yes, for providing transportation.

The Witness: We would inform the Gray Line Company that the trip would be delayed and the estimated arrival time.

The Court. Did you inform any other service of that fact?

The Witness: Only other airlines if we had connecting passengers.

The Court: I mean any other taxi service.

(Testimony of George E. Harrison.)

The Witness: No, no other taxi service.

The Court: That's all.

Mr. Winter: That's all.

The Court: Mr. Jones, do you have any other questions?

### Redirect Examination

By Mr. Jones:

Q. Each time that a limousine is to come to the airport with passengers or to meet a plane, was the dispatcher of the plaintiff company, the Gray Line Tours, notified? A. Yes.

Q. By what company?

A. By Northwest Airlines.

Q. That was the case in all trips?

A. For our passengers, yes.

Mr. Jones: That's all.

### Recross-Examination

By Mr. Winter:

Q. Well, would you notify the dispatcher if the plane was [31] on schedule? It wouldn't be necessary to call them, would it?

A. We call them for all trips.

Q. And at the same time you tell them the number of passengers that were expected to be using the airline service?

A. Yes, how many we expected to be in.

Q. As a matter of fact when they purchase a ticket you ask the passengers, whether, for example,



(Testimony of George E. Harrison.)

if he is going to Portland, whether he is going to use the airline service down there, don't you?

A. Yes.

Q. And its radioed in from the plane?

A. No, sir, not radioed. Its transmitted by land line teletype.

Q. Well, the information is——

A. Its communicated.

Mr. Winter: Communicated. That's all.

(Witness Excused)

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### FRED G. MILLIGAN

produced as a witness on behalf of the Plaintiffs, after being first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Jones:

Q. Will you state your name in full into the record?

A. Fred G. Milligan, M-i-l-l-i-g-a-n.

Q. Who are you employed by, Mr. Milligan?

A. Pan-American Airways.

Q. Were you employed by them from October the 10th, 1941 to September 30th, 1944?

A. Yes, sir.

Q. What was your job during those years?

A. I came here to Seattle from Fairbanks in May 15, 1940, and I was assistant airport manager.

Q. For Pan-American?           A. Yes.

(Testimony of Fred G. Milligan.)

Q. During that period of time how many flights in and how many flights out of Boeing Field did you have every day?

Mr. Winter: I think we have schedules of all those flights, Mr.—

A. Well it varied from year to year. [33]

Q. Have you got schedules for each period?

Mr. Winter: Well, we— A. In '41—

Mr. Jones: I'm just asking. It won't take him but a minute to answer.

A. Well, it would vary from year to year. In 1941 we only had three planes, so we made four round trips a week to Fairbanks.

Q. And then did it increase?

A. And then in 1942 we started our Navy contract, and then we had about fifteen planes running out to Adak.

Q. How many trips a day then?

A. Well, about seven trips a day with the Navy contract.

Q. In and seven out? A. Yes.

Q. Were any of those delayed by weather?

A. Practically all of them—practically all of them coming in.

Q. And what about going out?

A. Well, I'd say they got out, oh, at least eighty percent on time.

Q. Twenty per cent was delayed by weather—

A. Yes.

Q. —going out. [34]

Mr. Winter: No, coming in.

(Testimony of Fred G. Milligan.)

A. Not by weather, but by maintenance and weather both.

Q. Yes, but for some reason or other there were those delays?      A. Yes.

Q. At any time during that period did you operate out of some other field than Boeing?

A. Well, at the start of the war we were operating for about five months out of Paine Field, and we also operated out of Bow Lake after it was completed.

Q. Is Bow Lake the Seattle-Tacoma——

A. Yes, the Seattle-Tacoma Airport, yes, sir.

Q. Can you give an estimate of the approximate percentage of your trips that operated from fields other than Boeing?

A. Oh, I think about five.

Q. Per cent?      A. Yes.

Q. Did your company put calls in to the dispatcher of the Gray Lines?      A. Yes, sir.

Q. For all trips?

A. For all trips, coming and going.

Q. What—when there was a delay, how was it handled?

A. Well, it was handled by 'phone. I would call the Gray [35] Lines' dispatcher and tell him the conditions of the weather, and sometimes—most of the time it wasn't the Seattle weather that caused the delay. It was up around Alaska where it was pretty tough flying, and probably we couldn't get into Port Harvey or the next alternate, so we'd probably be late two or three hours on account of that.

(Testimony of Fred G. Milligan.)

Q. Were your flights on call during those weather——

A. The crew and everybody was there.

Mr. Jones: You may cross-examine.

**Cross-Examination**

By Mr. Winter:

Q. In 1941 you were operating regular flights to Alaska for the general public, were you not?

A. Yes, sir.

Q. When did you—did you change and then start operating there when the flights were limited to military personnel?

A. We flew our civilian equipment to Fairbanks and Juneau, and we flew the Navy ships to Adak, the personnel only,—Navy personnel.

Q. Did you maintain regular scheduled flights for civilians other than those which were connected with the Army or under priorities? [36]

A. Yes, sir. Well, no I would say those that we flew were civilians who had priorities.

Q. I see. They were all checked by the government——

A. All checked through the priority board, yes, sir.

Q. The general public then couldn't use the flights without getting——

A. Without getting a priority, no.

Q. Then you say about eighty per cent of your flights departed on schedule, but coming from Alaska a goodly portion of them were delayed?

(Testimony of Fred G. Milligan.)

A. Well, practically darn few of them ever got into Seattle within 25 minutes of schedule.

Q. You would always notify the Gray Line Tours the number—you'd have to call them to notify them the number of passengers who desired limousine service?

A. No, sir, we weren't allowed to.

Q. You weren't?

A. We weren't allowed to tell them how many passengers were coming in or going out.

Q. That was a restriction. Well, I mean prior to that time you did?

A. Well, the navy handled most of the passengers with their own buses.

Q. I see. [37]

A. And we handled the passengers that had priorities and were flying as commercial passengers.

Q. Were you operating under the same contract or arrangement with the Gray Lines that the United and the Northwest were operating—

A. Well, we never had any contract. I know we had an agreement with them.

Q. You mean a written contract?

A. I don't know if they had a written contract or not.

Q. But they did have a general understanding?

A. They had a general agreement, yes.

Q. Who is Mr. Bernhardt?

A. He was assistant traffic manager.

Q. For Pan-American Airways?

A. Yes, sir.



(Testimony of Fred G. Milligan.)

Q. I'll show you what has been marked for identification Defendant's Exhibit A-2.

Mr. Jones: Now, if the Court please, with respect to that exhibit, it is dated March 8, 1945, some six months after this period of time had gone by that we are interested in in this case. I think that it is for all purposes irrelevant, incompetent and immaterial. We have no desire to keep the information that the letter contains from the Court. For that reason, we are [38] not going to make any objection to it, but I do want to note into the record that we do not feel that it has any bearing on the outcome of this case.

Q. You will note that the letter refers to a change of pickups and departure points.

A. That's right.

Q. Did the pickup and departure points change from time to time under an agreement with the United and the Gray Lines?

A. Yes. I don't know about the United.

Q. Yes, I mean the Pan-American.

A. Yes, they changed from time to time.

Q. And that was as the result of conferences or agreements between the parties?

A. That's right.

Q. Passengers were never consulted about what points they were to be picked up at, were they?

A. Yes, I always called them personally.

Q. Yes, but you told them at what points they had to be picked up, didn't you?

A. I told them—I gave them the three places.

(Testimony of Fred G. Milligan.)

Q. Yes, and that was all?

A. That was all.

Q. And they couldn't be picked up anywhere else? [39]

A. Well, once in a while they would detour like to the Roosevelt Hotel or somewhere, if it was in the downtown district.

Q. But that was the exception rather than the rule? A. That's right.

Q. And an important personage might be picked up at some place?

A. Yes, we picked up an admiral.

Q. Yes, that was then the Navy was running it—the show, is that right? A. Yes.

Mr. Winter: That is all.

Mr. Jones: That's all.

Mr. Winter: We will offer in evidence Defendant's Exhibit A-2.

Mr. Jones: Now, if the Court please, these three witnesses all came in the same car and I want to try and let them all go back.

The Court: This exhibit will be admitted.

(Whereupon, document referred to was received in evidence and marked Defendant's Exhibit A-2.)

(Witness excused.)

Mr. Jones: There is one question I'd like to ask Mr. Dibble before he goes back. He's been on the stand once, and may I call him again? Mr. Dibble.

ARTHUR S. DIBBLE

recalled as a witness on behalf of the Plaintiffs, was examined further and testified as follows:

Direct Examination

By Mr. Jones:

Mr. Jones: May I see that first exhibit that was introduced, A-1?

Q. For what purpose was that exhibit—is that called A-1?      A. A-1, yes, sir.

Q. For what purpose was Exhibit A-1 made?

Q. Yes, the letter.

Q. Yes.

A. For what purpose was the letter written?

A. Yes, the letter.

A. It was in reply to an inquiry from our general headquarters, and the inquiry requested information, as I recall, as to what points we were——

Mr. Winter: Well, now, if the Court please, if he is going to talk about an inquiry on a written document, I think it should be produced.

The Court: Oh, he may go ahead and answer. Go ahead, please.

Mr. Jones: I didn't offer it in evidence.

Mr. Winter: You are asking now, and the Court has permitted it. [41]

The Court: Let's proceed.

A. The inquiry requested information as to what points were being used at that time to pick up passengers in the city, and what routes were used generally at that time, between the Airport and the city, and this is the reply to that inquiry.

(Testimony of Arthur S. Dibble.)

Q. Was that reply going to your home office just as it is, or was that a reply from the gentleman that signed it, to you?

A. No, the inquiry was directed to this man, with a copy to me, and the reply was directed over his signature to the general office with copy to me.

Q. Do you know whether the plaintiffs ever got a copy of that letter—were the Gray Lines provided with a copy of that? A. Not to my knowledge.

Q. Did you at any time in your capacity since you have been in this position, give any orders to Gray Lines as to what streets to travel?

A. No, sir.

Q. Do you know what the foundation for the information that was provided in that letter—where the gentleman that wrote it got his information?

A. Well, it would either be through his own personal observation as to the routes being used, or he might—— [42]

Mr. Winter: Now, if the Court please, this is going into conjecture as to what this other man had in mind.

The Court: Oh, he may answer so we can get along.

Q. Do you know anything about where he got his information? A. I can't say.

Q. He was your subordinate?

A. That's right.

Q. Well, did you at any time advise him of that information?

A. Provide him with this information?

(Testimony of Arthur S. Dibble.)

Mr. Winter: If he recalls.

Q. Do you know whether at any time you had given him the information that was put in the letter?      A. I don't know.

Q. You don't recall?

A. No, no, I don't recall.

Q. All the information that you had about the routes that were used, was acquired by you in what manner?

A. Through observation, or inquiring from other people in our organization.

Q. Now, I believe when you were being cross-examined you made some statement substantially to the effect that at the time this letter was written, that the course [43] described in here was the one largely in use at the time. Will you explain, over all the period that you worked for the company, from the time you worked up until September 30th, '44, as near as you can recall it in there, whether the use of one street would shift—they would be on one for a while and then another for a while, or just how? Just tell the Court.

A. I have ridden in the vehicles myself, in both directions, and there were times when the driver would use Fourth Avenue, other times when he would use Airport Way. I've had conversations with him as to why he might at one time prefer one to the other.

Q. You don't need to repeat the conversation. Now, have you ever observed yourself—have you ridden quite a lot?      A. Yes, I have.



(Testimony of Arthur S. Dibble.)

Q. Have you observed,—made any determination in your own mind as to what percentage of times over the overall picture, that they would be going one course as against the other?

Mr. Winter: Now, if the Court please, I submit——

The Court: The objection will be overruled.

Mr. Jones: It is limited to his own experience.

The Court: Don't argue with counsel.

Mr. Jones: Sir?

The Court: Counsel should not argue with counsel. Address your remarks to the Court rather than to counsel.

Mr. Jones: Pardon me.

The Court: The objection will be overruled. Proceed.

Q. Have you observed?

A. As near as I can say it would be about fifty per cent of the time.

#### Cross-Examination

By Mr. Winter:

Q. You didn't go to the company in 1943—until 1943, did you, to United? I say, you didn't come here to Seattle with United until 1943?

A. That's correct, I transferred in 1943.

Q. And you don't know what arrangements as to routes or anything else happened before that time?

A. Only——

Q. Of your own knowledge?

A. Only from information given me by my predecessor.

(Testimony of Arthur S. Dibble.)

Q. But of your own knowledge you don't know anything about it, except what somebody has told you? [45]

A. No, not through direct observation, I wasn't here.

Q. Well, you don't know what agreements might have been made before that time which were still being followed, do you?

A. Only what's contained—may be contained in conversations.

Mr. Winter: That's all.

Redirect Examination

By Mr. Jones:

Q. If there were any designations of routes that were made prior to when you got there, would they have been in your files, or some notation?

Mr. Winter: I don't know how he would know that.

Mr. Jones: Well, he would know.

Mr. Winter: Whether they would still be there, or not.

Q. Well, were they in your files?

A. It is customary to give those instructions to Gray Lines in writing when requesting a change in route, or pickup point, and I think there would be such correspondence in the files that were left.

Q. Was there any such?

A. I can't say.

Q. You have never. If it has, it made no difference to you [46] whether or not—

(Testimony of Arthur S. Dibble.)

Mr. Winter: Well, now, if the Court please, its argumentative.

The Court: I think the last question is: How many recognized or standard routes are there between Boeing Field and downtown Seattle?

A. I would say there are only two possible routes for minimum driving time. One would be Fourth Avenue, the other Airport Way.

The Court: And is Fourth Avenue on Highway 99?

The Witness: It is now.

The Court: But during the war period Highway 99 was closed.

The Witness: Part of the way I think it was obstructed, yes.

Mr. Jones: That's all. Thank you very much.

The Court: It's now time for the noon intermission, so we will take an intermission until 1:30 o'clock.

(Witness excused, and recess.) [47]

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1:30 o'Clock P.M.

AUGUST H. WENCK

produced as a witness on behalf of the Plaintiffs, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Jones:

Q. Will you state your full name into the record?      A. August H. Wenck.

(Testimony of August H. Wenck.)

Q. What is your connection with the plaintiffs in this case?

A. I'm a third owner of the Gray Lines.

Q. And the other two plaintiffs, Mr. Royce—E. Royce and B. Royce are your partners?

A. That's right.

Q. And prior to that the Gray Line Tours was a Washington corporation? A. That's right.

Mr. Jones: Now, I don't think that it makes any difference in the theory of this case—I'm sure it doesn't, I've just called counsel's attention to it. We may not have been accurate this morning as to the date that it went over from a partnership—from a corporation to a partnership. After the noon—at noon, [48] after the morning session was over, our auditor, Mr. Brent, called attention to the fact that the stipulation that Mr. Winter and I entered into in court this morning was not technically accurate; that the contract, which by the way I'll offer in evidence right now, pretrial exhibit 4, and have it marked as a plaintiff's exhibit—Plaintiff's Exhibit 1—you are familiar with it, Mr. Winter. That was made out in May as a corporation instrument; but that the partnership went into effect on the following July and that it was due to clerical error on the part of the bookkeeper that made up the forms of the returns, that these were shown for the first seven returns as corporation returns. It should—they should have been partnership returns all that time, but under either theory the result would be the same in this case.

(Testimony of August H. Wenck.)

Mr. Winter: They wouldn't make any difference in view of the stipulation.

The Court: That's July of what year—of '42?

Mr. Jones: Of '41.

Mr. Winter: That's what they tell me. I don't know that. I don't think it makes any difference, even though Mr. Wenck, as former president, signed these returns showing that the corporate business.

Mr. Jones: They were signed as general [49] manager.

Mr. Winters: Yes, but I say it bears the corporate name.

Q. Now, then, your job in the partnership—your title in the partnership was what, Mr. Wenck?

A. General manager.

Q. And at all times since the partnership came into existence, have you been general manager?

A. That's right.

Q. You are also connected with Yellow Cab?

A. Yes.

Q. And are you—which company do you spend most of your time with? A. Yellow Cab.

Q. And you have in Gray Line Tours some assistant managers? A. Yes.

Q. And a traffic manager? A. Yes.

Q. And who is the assistant manager?

A. Mr. Stratten.

Q. And Mr. Stratten was working for you in 1941? A. Yes.

Q. And then he was in the army a while?

A. That's right.



(Testimony of August H. Wenck.)

Q. He returned? [50]

A. That's right.

Q. He's with you now? A. Right.

Q. You were a partner and general manager from—particularly October 10, 1941, to and including September 30, 1944? A. Yes.

Q. This line of sight seeing cars, that's separate from the airplane limousine service?

A. It's a different type of service.

Q. And it's different from the general service?

A. Yes.

Q. All right. But they are all handled by Gray Lines? A. That's right.

Q. During the time I mentioned, from October 10th, 1941, to and including September 30th, 1944, your limousines were used to convey passengers, were of what seating capacity?

A. Seven-passenger cars.

Q. And those were the ones involved in this litigation? A. That's right.

Q. Now, are you familiar with the way the operation was conducted from the start of the trip to the airport, and from the start of the trip at the airport back to town? A. Yes.

Q. Would you explain how a vehicle would get started on its [51] way in making one of those trips?

A. Well, the vehicle would first——

Mr. Winter: Are you reading from something, Mr. Wenck?

The Witness: No, just this——

(Testimony of August H. Wenck.)

Mr. Winter: Is that your contract?

The Court: That's the exhibit.

A. The thing you just gave me.

Mr. Winter: The contract?

The Court: It should be back in the Clerk's hands. He just happens to be holding it.

The Witness: Shall I lay it down?

The Court: Yes, the bailiff should put it—just hand it back to him.

The Witness: Now, what was the question—How we operate this service? Well, the dispatcher at the Gray Line garage instructs the driver where to go. In other words, the dispatcher first receives an order from an airline office advising him to send a car or a number of cars to pick up a certain number of people at a certain place, and the dispatcher in turn gives that driver that information and he proceeds on his way.

Q. And how do they start at the other end, Boeing Field?

A. Well, the dispatcher always knows how many fares or what car there is at the field, and when the car arrives [52] at the field and after he completes his transaction, that is by delivering the passengers he took out, he calls the dispatcher to find out what his next move will be, whether he stays and waits for a plane or whether he comes back into town for another load of passengers to take to the plane.

Q. Does the driver make any trips in either direction without an order from the dispatcher?

A. He's not supposed to.

(Testimony of August H. Wenck.)

Q. And do you know whether the dispatcher—do you know where the dispatcher gets his information with respect to when and where to send the car?

A. From one of the airlines offices.

Q. Does he send out any trips without a communication from the airlines?

A. I don't believe so.

Q. Now, did the airlines—did any of the airlines specify to the Gray Line the route to follow?

A. Not to my knowledge.

Q. Had the Gray Lines,—well, who would have been the person they would have given it to if they were specifying the route.

A. Well, they would discuss those things with me.

Q. All right. Did your company, the plaintiffs in this case, specify to the drivers what streets to use in [53] going to and from the business district and the airport?

A. No.

Q. Do you know what streets your drivers use?

A. Well, I know there are only two main streets, once they get down to the south end of town, say Dearborn Street, they can either go out Fourth Avenue South to Racine Street and then over to Airport Way and continue on through Georgetown into, or over to the Boeing Airport, or else they can come down any other street in town from the Waterfront on up to about Sixth Avenue and get to Dearborn Street and then go out Alaska Way. We don't care which way they go.

(Testimony of August H. Wenck.)

Q. Are there any factors, that you know of, that influence or go to determine which of those streets the drivers follows?

A. Well, I suppose getting out of the downtown area is governed by traffic and no left turns and that sort of thing, and I think that more or less governs what street he goes south on until he gets down to say Dearborn Street and then he makes a decision whether he is going Fourth South or go out Airport Way.

Q. Does it make any difference to you, in other words, is the Company or the plaintiffs concerned with which way they go? A. No. [54]

Mr. Winter: Well I submit, if the Court please, he is leading the witness all over the place.

The Court: He may answer. We will get along and save a little time.

The Witness: It makes no difference.

Q. Now, has any public authority, the town, the City or the State of Washington specified a route for your company? A. No.

Q. Do you hold from the State of Washington—I believe you call it in this state your Department of Public Works—maybe they've changed it to the Department of Public Service—one or the other, or both, do you hold any certificates of convenience or necessity from such department?

A. Not during that period.

Q. Well, have you ever held one for that particular run from town to the Boeing Field?

A. No.



(Testimony of August H. Wenck.)

Q. At no time? A. No.

Q. Did your company at any time ever advertise in the paper or by poster or in any other manner, your service for the airline companies?

A. No. [55]

Q. What passengers are transported in this airline limousine service?

A. Airlines' passengers and airlines' employees, such as stewardesses and crews they call them, the pilots, copilots and that sort of thing.

Q. How about the general public? A. No.

Q. We've talked a good deal about the down town district of Seattle, with respect to the airlines and your company's understanding of the term "down town district of Seattle." What were the boundaries?

Mr. Winter: If the Court please, the contract is in evidence and designates the boundaries and all of this and it's in the pretrial order. I don't see the necessity for going into all of this.

Mr. Jones: Very well.

The Court: It is unnecessary to go into the matter again if it is covered by stipulation.

Mr. Winter: And the contract, Exhibit 1, which was just introduced in evidence.

Mr. Jones: I am perfectly willing to stand by the contract boundaries, but did you have contracts—written contracts with Northwest or with Pan-American?

The Witness: We did not. [56]

Q. Now then, the boundary as specified in the



(Testimony of August H. Wenck.)  
contract that Mr. Winter has referred to, which is Plaintiff's Exhibit 1, was the same boundary that is stated in there, was also the final boundary with respect to the two other airlines?

A. That's right.

Q. Did—I'm not sure whether my question was confined to one airline, but did any of those three airlines specify a route?      A. Oh, no.

Q. Did they have the power to?

Mr. Winter: Now, just a moment.

The Court: I think perhaps that is calling for a conclusion.

Mr. Jones: Well, if the Court please, if this contract here, it governs it for the United, but I have to find out because there was no written contract with the other two.

The Court: He's answered and we'll get along.

Mr. Jones: Get at it this way:

Q. How were the points or places in the business district, where you would pick up passengers, how were they specified?

A. Oh, we would usually have a discussion about the situation as to how the airlines wished their people serviced and we'd try to cooperate and comply with their wishes. [57] Sometimes we'd pick up at various hotels, other times we'd pick up only at one or two or three places.

Q. Were they ever changed?

A. From time to time, yes.

Q. Well, who had the—we'll let the contract speak as far as the United is concerned. Confining

(Testimony of August H. Wenck.)

this question to the Northwest and the Pan-American, as between your company and those two companies, was there any understanding with respect to who could designate the points of pickup?

A. Well, the airlines companies would designate the points of pickup.

Q. Well, was it within their power or your agreement in arranging with them to do that?

A. Well, we had a verbal agreement that we would do that sort of thing for them.

Q. Wherever they wanted you to?

A. Certainly.

Q. Now, did you ever publish yourselves—I asked you about advertisements. Now I am speaking about schedules. Did you ever publish or post schedules of your departures from the airport or from the pick up points in the down town area for the use and perusal of the general public?

A. No.

Q. What governs the times of your departures from either end? [58]

A. The information that would be passed on to us by the various airlines, instructing us what to do and where to go and when.

Q. Did you run trips without getting those instructions? A. No.

Q. Now you began paying this tax the exhibit shows, sometime in January or thereabouts, early in 1942. How did you start to pay this tax? Why? Tell us the circumstances.

A. Well, as I recall, it seems like there was some

(Testimony of August H. Wenck.)

mention made, an article in the newspapers saying that there would be a transportation tax becoming effective at a certain time, and Mr. Stratten and I discussed it, as I recall it at that particular time, and so we decided—I think it was give per cent at first that we would raise our rates from seventy-five to eighty cents, in order to be protected in the question of tax, and that continued on and until a later date we were advised that the tax did not apply.

Q. Did you ever consult attorneys at any time prior to making your bookkeeping entries concerning this tax?      A. No.

Q. Had the tax—when did you consult first or have any——

Mr. Winter: I don't see the materiality for this line of questioning, if the Court please. [59]

The Court: Oh, he may answer.

Q. When did you—when were you first advised that the tax did not apply?

A. I don't recall the exact date. About the time we stopped paying it—was that in '44?

Q. Have you paid taxes since you got that advice?      A. Not on the seven-passenger cars.

Q. Now——

Mr. Jones: There are exhibits in evidence which I think I will ask Mr. Winter, if I may, do the exhibits show the method of keeping books clear up to the present time?

Mr. Winter: What do you want to know?

Mr. Jones: Do the exhibits that you have in

(Testimony of August H. Wenck.)

evidence show the method of keeping books after they stopped paying the tax? Do they still show how the books were kept?

Mr. Winter: We only introduced in evidence the books during the period here involved, and I think they show. It is in the stipulation, the method of books, and the exhibits are referred to, and the whole thing is in there.

Mr. Jones: Just one second, let me look at that.

Mr. Winter: It starts in Paragraph XVI, page 6.

Mr. Jones: You may cross-examine.

### Cross-Examination

By Mr. Winter:

Q. Now, Mr. Wenck, under your agreement with the United—your written agreement with United and you say you had oral agreements with the other companies, were their agreements substantially to the same effect orally, as the written agreement with United?

A. In other words, if we did something for United we'd naturally do it for the others the same way.

Q. And under your agreement with United you understood that you had to maintain or have busses available to meet every outgoing flight and every incoming flight, according to the schedules furnished you, is that right?

A. We agreed to give service.

Q. Yes.           A. Yes.



(Testimony of August H. Wenck.)

Q. And the United, the Northwest and the Pan-American furnished you, as they changed their schedules, with copies of their schedules, didn't they?

A. We always knew what the schedules were.

Q. Yes. As a matter of fact they furnished you schedules so you could give your drivers, didn't they? [61]

A. I don't think they were ever given the drivers.

Q. The drivers could give them to the passengers?

A. Well, if they did that it is something that I know nothing about it.

Q. Yes. They never offered you one like they have me?

A. I got it in the mail whenever there was a change.

Q. I see. Well, if planes were leaving at 8:00, 9:00, 10:00, 11:00 and 12:00 in the morning from the United, you knew that you were required, if there were any passengers, to make those schedules on those particular hours, didn't you?

A. We knew that when we were called from the airlines if there were passengers to be moved, that we would move them.

Q. Well, you were familiar with those four or five regular hourly flights, weren't you?

A. We had a pretty good idea when to expect a call.

Q. Yes, and when it was good weather and it



(Testimony of August H. Wenck.)

was reasonable to assume that the flights would leave on schedule, I mean the Navy flights, isn't that right?

A. Usually, when the weather was good.

Q. And you would so arrange the affairs of your company so that you could have the first bus service for each one of those schedules, as you agreed to under your contract?

A. We were prepared at all times to give service, regardless [62] of weather.

Q. In other words, sufficient cars or busses you were required to provide for each such trip under your contract, isn't that right?

A. If it was humanly possible to provide it.

Q. And additional cars and busses were provided when it was required by the United, or those other companies, is that right?

A. What do you mean, additional cars?

Q. Well, in your contract it says sufficient cars or busses shall be provided by Gray Lines for each such trip, and additional cars or busses shall be provided when requested by United as provided herein.

A. Providing we had the equipment to do it with.

Q. And then you would furnish yellow cabs?

A. That's right.

Q. You being connected with the Yellow Cab Company, of course, you provided yellow cabs, is that correct?

(Testimony of August H. Wenck.)

A. That's right. I wouldn't; the dispatchers would handle that.

Q. Did you discuss with the airlines any time when points of departure were changed?

A. Did I?

Q. Yes.           A. No. [63]

Q. Well, who handled that for your company?

A. Our dispatchers and their dispatchers would probably talk about schedule changes and things of that kind.

Q. And you say there were only two practical ways of going down to—going out to the airport from the city center?

A. I don't know of any other way to go.

Q. And depending on road conditions, they would go out either one or the other?

A. We weren't concerned which way the boys went.

Q. Well, of course you were concerned if they made a detour by way of Tacoma, wouldn't you be?

A. Well, yes, that's—

Q. And you were concerned if they went up beyond Seventh Avenue and tried to go up out over Rainier Avenue, and then up over the hill?

A. They couldn't get there that way.

Q. They couldn't go out Rainier Avenue and then up over the hill to the airport?

A. Oh, yes, it would take probably three or four times as much time to do it.

Q. And what time did you limit them from the Olympic Hotel to the airport?

(Testimony of August H. Wenck.)

A. Reasonable safe, driving time.

Q. Well, what was your schedule?

A. We didn't have any schedule. [64]

Q. Well, what was the time the passenger was required to be at the Olympic Hotel for limousine service to the airport?

A. Oh, back in those days I think we had something like—it was either forty or forty-five minutes.

Q. That was the limit, wasn't it?

A. Well, that's what they tried to have the people ready so that they would get out there in time to get aboard the plane.

Q. And did—were you able to increase the—or lessen the time in which it took to go out to the airport?

A. I think they hope now to do it in about thirty-five minutes.

Q. In the event there were two limousines waiting to pick up passengers at the departure point, is it customary for one of the limousines to wait for the other and go out together, more or less?

A. Honestly, I can't tell you how that operates. The men do that with the dispatchers. I don't stand there and see how they handle that particular detail.

Q. Well has all your testimony been what the dispatchers and the men have told you about how they handle it?

A. Well, about some of the minor details, yes.

Q. Now you say that not during this period you had a certificate of public necessity, convenience

(Testimony of August H. Wenck.)

and public necessity. What period did you have such certificate? [65]

A. Of convenience necessity?

Q. Yes.

A. We just recently were issued one for the Bow Lake Operation.

Q. The Bow Lake.

A. We never had one before.

Q. Well, of course that's an operation that is outside of the city limits?

A. Yes, that's right.

Q. And it comes within their jurisdiction?

A. It comes within the State regulations.

Q. Yes. And in the city, of course——

A. The city regulations.

Q. Now, with respect to the collection of this fare. It's a fact that every time the tax increased you furnished your drivers with a statement of the fare and the amount of tax which was then operating, didn't you? A. That's right.

Q. And they were given to each one of the drivers at that time?

A. The driver was told what to collect.

Q. Yes. And also a schedule was maintained in the office? A. What do you mean, a schedule?

Q. Well, you had the schedule in the dispatcher's office.

A. Of the charge, you mean? [66]

Q. Yes. A. The fare?

Q. Yes, table of fares.

A. Well, everyone knew that.



(Testimony of August H. Wenck.)

Q. Yes. Whenever you changed your fare did you discuss it with the United, the Northwest and the Pan-American people?

A. I think we did, we probably told them we were going to charge eighty cents or whatever the fare was.

Q. And of course your billings to those companies showed the seventy-five cents plus tax?

A. Yes.

Q. And your contract called for seventy-five cents? A. I think that's right.

Q. And that has been your charge ever since the contract went into effect?

Mr. Jones: If your Honor please, the order covers it and it is not quite that way.

Mr. Winter: He just said it was—75 cents has been their regular fare.

Q. That's with the exception of the two-cent break in the tax that occurred in 19—when the tax was fifteen cents—I mean ten cents, isn't that right?

A. I think it started off at five, ten and fifteen.

Q. Yes, I know but the fare has always been seventy-five [67] cents except for a few cents in the break on tax, or if it was included it wouldn't figure out to even change, without using pennies.

A. I think for bookkeeping purposes, it was decided in the office they would set up one item as the fare and the other as the tax. I think that's how it was handled, and that's probably the reason why.

Mr. Winter: I think that's all.

Mr. Jones: I would like to offer in evidence at this time the pretrial exhibits 1, 2, 3—



(Testimony of August H. Wenck.)

Mr. Winter: Just offer one at a time, Mr. Jones.

Mr. Jones: Well, I'm just getting them out here.

Mr. Winter: 1, 2, and 3.

Mr. Jones: 6 and 7.

The Court: 1 is admitted.

Mr. Winter: 1 is admitted; we have no objection to 2——

Mr. Jones: Have you—have you put in pretrial exhibit 1?

The Court: Plaintiff's exhibit 1——

Mr. Jones: Oh yes, Plaintiff's exhibit 1 was pretrial exhibit 4.

Mr. Winter: Oh yes, that's right. [68]

The Court: 1, 2 and 3 that are pretrial Exhibits 1, 2 and 3. You are offering now?

Mr. Jones: Yes.

Mr. Winter: We have no objection.

The Court: They will be admitted.

Mr. Jones: Yes, would you care to number them, and I'll——

The Court: 17 is a map of the City of Seattle, any objection, Mr. Winter?

Mr. Winter: To the map of Seattle? Now, let's see, he is offering Exhibit 1 and 2 and 3, that is pretrial exhibits 1, 2 and 3.

Mr. Jones: Right.

Mr. Winter: And what numbers will they have, please, I just want to keep these straight—2, 3 and 4?

(Testimony of August H. Wenck.)

The Clerk: 2, 3, 4 and 5.

Mr. Jones: Well——

Mr. Winter: Now——

Mr. Jones: Just a minute, so we can get this straight. Pretrial exhibit 1 is Plaintiff's exhibit 2, isn't it? Pretrial exhibit 2 is Plaintiff's exhibit 3, and Pretrial exhibit 3 is Plaintiff's exhibit 4. Now the next one I would like to offer would be pretrial exhibit 6.

(Whereupon, documents referred to [69] were admitted in evidence and marked Plaintiff's Exhibit 2, 3 and 4.)

Mr. Winter: Well——

Mr. Jones: Unless you have marked 17 already. Pretrial Exhibit 6, I want to offer.

Mr. Winter: We will object to the introduction of pretrial exhibit 6 on the grounds that it is irrelevant and immaterial as to how these cabs might have been licensed for traffic or for City or State tax purposes. We don't deny, of course, that that is a copy. We furnished counsel with a copy of that ordinance.

The Court: I think I will overrule your objection and admit it in evidence.

Mr. Jones: Will that be 5?

(Whereupon, document referred to was admitted in evidence and marked Plaintiff's Exhibit 5.)

Mr. Jones: Then I'd like to have marked Plaintiff's exhibit—pretrial exhibit 17, I believe there are two of those maps.

(Testimony of August H. Wenck.)

Mr. Winter: Now, what are those maps?

Mr. Jones: Those are maps of the City of Seattle.

Mr. Winter: There are two maps?

Mr. Jones: There are two—one has the [70] arterial highways colored, and the other one is a plain map.

Mr. Winter: Of course, we don't deny the authenticity of these maps, if the Court please, but as to whether or not they were prepared to show the streets that existed in 1941 through '43, I assume that they are. We have also exhibits——

The Court: Well, let's dispose of this matter first, Mr. Winter.

Mr. Winter: We have no objection, your Honor.

The Court: They will be admitted in evidence.

(Whereupon documents referred to were admitted in evidence and marked Plaintiff's Exhibit 6.)

Mr. Jones: We—I might state for your Honor's information at this time, that the one map is an exact copy to scale of the other, but some of the streets running over the hill from downtown Seattle to the airport, like going out Ninth Street, isn't through, and so I bought the map that had the arterial streets colored, so they could be followed more easily, and would it be convenient if those were numbered 1-A and 1-B or something so that they—or will the one number carry both of them?

The Court: Oh, I think one number will carry both of them. Anything further of this witness?

(Testimony of August H. Wenck.)

Mr. Jones: One more question, please, if I may ask it.

Redirect Examination

By Mr. Jones:

Q. Where would passengers—do you know where passengers coming from Boeing Field in to downtown Seattle would be discharged?

A. Most anywhere they choose.

Mr. Winter: Now, just a minute, if the Court please, I want to ask this witness if he is testifying now from his own observation or from what the dispatcher and the men have told him?

The Witness: From my orders to the dispatchers in this case.

Q. What were—what was—

Mr. Winter: Now, I don't object to the testimony of what his orders was, but as to whether it was carried out he wouldn't know. What were your orders?

The Witness: That any passenger wishing to get off of a limousine coming in from the airport, in the downtown area or adjacent to it, or anywhere in the south end of town, the driver was permitted to dismiss that passenger. Shall I illustrate?

The Court: Oh, I think the Court understands that; the contract apparently covers that. It provides [72] specifically for the discharge of passengers at the stations, railway stations, if they should so desire, and provides for porter service if there is no porter available.

(Testimony of August H. Wenck.)

Mr. Winter: There is one question akin to us, but not along exactly the same line.

Q. Did you have any order with respect to whether some digression from the shortest course between Boeing Field say, and the Olympic Hotel could be made?

A. The driver used his own judgment as to where he would go and discharge or dismiss the passengers.

Q. Well, do you know, however, of your own information whether, if you drew the shortest course on the map that you could follow through the streets and get from Boeing Field to the Olympic Hotel say, whether he could depart from that course to discharge a passenger? A. Yes, he could.

Q. Do you know whether they did?

A. Yes.

Q. Did they? A. Yes.

Q. Now is making pickups, did the—oh, I better ask this of the dispatcher. That's all.

Mr. Winter: That's all.

The Court: Would your drivers—were they [73] authorized to stop between Boeing Field and downtown Seattle and pick up passengers?

The Witness: No, they had their loads before they left.

The Court: And when they left Seattle, were they permitted to stop between the airfield and the place where they loaded.

The Witness: There were many times when the driver would be instructed by the dispatcher, who



(Testimony of August H. Wenck.)

had been instructed by the dispatcher at the airlines, to pick up a certain person or persons at the Olympic or the ticket office, or at some hotel, and on the way to the field stop at the Immigration station and pick up someone there, or go to the Coleman Dock and pick up Admiral So-and-so, or something like that, or the Exchange Building, or places of that kind.

The Court: No, but all passengers that boarded these limousines did it with the Boeing Air Field as their destination?

The Witness: Oh, yes, going on a plane. We would get the order or information from the dispatcher at the airlines, you see, and our dispatcher would in turn would relay that to the driver.

Mr. Winter: I would like to ask him a question.

#### Recross-Examination

By Mr. Winter:

Q. You kept charts of the—your passenger distribution and your pickup business, didn't you, Mr. Wenck?

A. What do you mean, charts?

Q. I mean you kept schedules showing what per cent of passengers—the number of passengers that were picked up at Boeing, I mean at the Olympic Hotel, the number picked up at the Roosevelt Hotel, or any of these designated points of dispatch—

A. Well, the driver makes a report on his trip sheet.

(Testimony of August H. Wenck.)

Q. Yes, then you computed—you computed the statistics on that too, didn't you, you had those figures?

A. I don't think so. You mean, as to how many passengers were at each point?

Q. Yes.

A. Oh, I don't think we ever——

Q. You don't think so?

A. No, I don't think so.

Q. And you wouldn't say that you don't, Mr. Wenck, would you?

A. Well, if there are I've never seen any of those figures.

Q. Well, do you mean to tell me as general manager if they kept a set of books like that, which I'm sure they did, that you don't know about it?

A. Let me get your question right. [75]

The Court: Well, the question is, could you, from your books and records tell the origin of outgoing passengers?

Mr. Winter: From each particular point.

The Court: From each particular point.

The Witness: I don't know whether we kept that record or not, but it would be on the driver's report for each trip that he makes, it shows where he picks up a passenger and where he dismisses the passenger.

The Court: What did he do with the reports?

The Witness: Turn it in to the cashier with his money, and that is all there was to it.

Q. And then they made up the monthly reports from those, didn't they?

(Testimony of August H. Wenck.)

A. The bookkeeping department, yes.

Q. Yes. And then they made yearly reports from them? A. Certainly.

Q. Yes. And then they take all the daily reports showing ten passengers for each day, for example, and at the end of the year you would know how many passengers were picked up at the Olympic. You kept those records, didn't you?

A. Well, I don't know whether they know if they were picked up at the Olympic or the Washington or where; I don't know whether they keep that record or not. [76]

Q. Well, the drivers kept daily records of that, did they not?

A. He makes a report of each passenger he carries and where he carries the passenger from.

Q. Yes, and then those reports are turned over to the bookkeeping department?

A. That's right.

Q. And then they compute monthly totals of those reports, don't they?

A. Certainly, they know how many passengers were carried, but I don't know whether they know how many came from one place or another.

Q. Well, do you know what percentage of the passengers during all of this period were picked up at the Olympic Hotel?

A. No, I don't. I have no idea.

Q. Would you say it was less than seventy per cent? A. I don't know, I have no idea.

(Testimony of August H. Wenck.)

Mr. Winter: Well, that answers the question. That's all.

Mr. Jones: Thank you.

(Witness excused.)

Mr. Winter: Do you have those reports here, Mr. Jones? I have the books.

Mr. Jones: Well, we will find out when this next witness takes the stand. Mr. Stratten. [77]

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### EARL E. STRATTEN

produced as a witness on behalf of the plaintiffs, after first being duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Jones:

Q. Mr. Stratten, will you give your name in full?      A. Earl E. Stratten.

Q. Where is your residence?

A. Algona, Washington.

Q. Where?      A. Algona, Washington.

Q. And you work in Seattle?      A. Yes.

Q. With whom?

A. With Gray Lines Tours.

Q. How long have you been employed by them?

A. About thirteen years, with a few years out—three years, a little over three, I was in the Army.

Q. When did you go into the service?

A. I went into the service in November, 1942.

(Testimony of Earl E. Stratten.)

Q. And from October the 10th, 1941 until November in '42 when you went into the service, what was your job with the plaintiffs?

A. I was dispatcher and did part of the book-keeping.

Q. Since you—when did you return? [78]

A. Back in January, 1946.

Q. And you've been working for them in what capacity since?

A. Since then I've been dispatcher and Assistant Manager.

Q. Now, you were working for them, according to that, when they started the airline service?

A. That's right.

Q. Were you working for them when the tax which is involved in this case, the transportation tax, went into effect?      A. Yes.

Q. And you were doing some bookkeeping then?

A. Yes.

Q. Now, as the dispatcher, would you explain—and how much of your time, before you went into the army was put in as dispatcher?

A. Well, during a portion of the year which was the winter months when the business wasn't all operating, I had the dispatching all of the time, that was the full daytime dispatching. And then during the summer months, when there was sight-seeing business involved, I was dispatcher part of the time and working on the books part of the time, and sort of supervising; and we also had at that time an extra dispatcher.



(Testimony of Earl E. Stratten.)

Q. You're familiar, from your personal experience, with how the operations of the limousine service were conducted and dispatched before you went into the Army? [79]

A. Yes.

Q. Will you explain just how you start a car moving out on its trip and handle it?

A. Well, we got our call, we got our call from the airlines, whichever airline may have a trip going out would call us, advising us the number of passengers and at one time they gave us the names of the passengers to be picked up at certain designated hotels; they'd tell us at that time what hotel and the passenger's name; and they'd tell us what time the flight was departing from the field; they'd tell us what time we should leave from the hotel for the airport to bring those passengers out, and I would make a slip on that to give to the driver—we might use one or two drivers and I'd give them each a slip so that they'd make their pickups, and depart from the hotel in time to get to the airport as the instructions were written on the slip.

Q. Now, about how many points of pickup in the downtown area would an airline have?

A. At the start of the lines in question, we had as many as six pickup points at one time; we had at one time the New Washington Hotel, the Roosevelt Hotel, the Benjamin Franklin Hotel, the Vance Hotel, and the Olympic Hotel, stop at the Hungerford Hotel, and also at Airline ticket office, and during—well, prior to the time I went in [80] the Army, those pickup points were kept to less stop-

(Testimony of Earl E. Stratten.)

ping places and the United Airlines, at the time, I believe when I went into the Army, were using the Olympic Hotel and their ticket office. Pan-American Airways was using the New Washington Hotel and the Olympic Hotel, and Northwest Airlines, I believe, was using the Olympic Hotel at the time I went in the Army.

Q. Now, at the times when there was more than one pickup point, if your entire load, as you got the information from the airlines would be at this one point, did you dispatch the car around to all the other points if there weren't people there?

A. No, at the time when we were making the various hotel stops, we went to only the hotels the airline designated at the time they gave me the dispatch for that particular trip.

Q. Now, what instructions, if any, did you give the drivers with respect—withdraw that. Who issued the instructions about the trip orders directed to the drivers?      A. I don't get the—

Q. What—

Mr. Winter: You might let him answer the question; you asked him one question—have you withdrawn it?

The Court: He says he doesn't get the question, Mr. Jones.

Mr. Jones: Thank you.

The Court: Proceed.

Q. Did you get the question?

A. No, I didn't.

(Testimony of Earl E. Stratten.)

Q. What employee of the plaintiffs would give the trip orders directed to the drivers?

A. The dispatcher.

Q. All right. What orders did the dispatcher give to the drivers with respect to where they could discharge passengers coming in from Boeing Field?

A. The only orders issued was the cars were to stay within the downtown area on their dismissal, but anywhere in the downtown area was considered as a dismissal point, anywhere they wished.

Q. Well now, you—I want to take this same illustration I used with Mr. Wenck. If you could draw a map, the shortest distance along the streets from the airport to the farthest one of your hotels that you went to, and somebody wanted to get off halfway, and at some halfway point, a block or two or three off to the side from this line, would they, would the driver be permitted to digress?

A. Sure.

Q. Now, if meeting airplanes that were coming in, how was that handled? [82]

A. The airline called us—that is, the dispatcher for the Gray Line at the—our office, and told us that such and such a flight would be arriving at a certain time, and if they had the information as to the number that wished limousine service they would give us that, or if they didn't have that information they would possibly tell us how many were on board, and I believe at one time, from Pan-American Airways all we received was that a plane was arriving at a certain time, and then I would,

(Testimony of Earl E. Stratten.)

to the best of my ability, if I had the equipment available, I would have enough equipment at the airport to service the number of passengers that were designated or that I figured would be there to ride into Seattle.

Q. Did you ever send a car out to meet an airplane and not get any passengers back?

A. Many times.

Q. What would happen to the car in a case of that kind?

A. Well, if I had notice from the airlines of some other flight that was arriving, I'd leave the car out there to cover it, or if I didn't have and didn't have anything else for that car to do right at that time, I'd tell him to stay there at the airport until further instructions or until a plane came in with some passengers that were going into town; or if I needed the car back in town before there was anything at the airport to be covered, [83] I'd tell him to come back into town and I would give him orders from there.

Q. Now, where was the garage of the Gray Line Tours located during the time you were dispatcher before you went to war?

A. 2109 Eighth Avenue.

Q. And when you were sending a car out to meet a plane, where would it be sent from?

A. It would, in most cases be sent from the garage, although on occasion they would be at a hotel, if you could—if I could get in touch with the



(Testimony of Earl E. Stratten.)

driver at a hotel, before he got into the garage and I needed him on some trip, I'd send him direct from there.

Q. Now, did you ever send a car from the garage or from one of the hotels to the airport to meet passengers empty? A. Yes, we have.

Q. And if they were leaving from the garage, would they go to all these stopping points before they went to the Boeing Field? A. No.

Q. How would they go?

A. Well, to my knowledge they would go the shortest and most practicable route.

Q. And make no stops en route?

A. That's right. [84]

Q. Go directly from the garage?

A. That's right.

Q. What do you call that, when you go without passengers? A. Deadheading.

Q. And did you ever deadhead from Boeing Field back to the down town area? A. Yes.

Q. For what purpose? A. Well——

The Court: He's covered that.

Mr. Jones: No, I mean the other way.

The Court: Yes, he's covered it from the field, and you asked him if he'd ever gone to the field and came back without.

Mr. Jones: All right.

Q. Did you ever send a car out on a trip, in either direction, without an order from the airport?

A. No.



(Testimony of Earl E. Stratten.)

Q. Now there has been quite a little mentioned from time to time of getting schedules from the airlines of their own departure and landing times. What did you use those for?

A. We used those to make up schedules for my own use in the dispatching end of it so that I could have some idea of when there would be planes arriving and departing, and could sort of keep what you might say, a little look towards what was coming up next, to be able to—well, be in a better position to handle the business from whatever end it may be developed.

Q. Although a plane, according to the schedule would be departing at a certain time, if you had no call for passengers to go out, would you send a plane out—or send a limousine out?           A. No.

Q. Who took your place when you went to the Army?           A. Anita Turnpole.

The Court: Is that all, Mr. Jones?

Q. At any time while you were dispatcher, did they ever give you the names of the incoming passengers?           A. No.

Q. Just the number?

A. Just the number, yes.

The Court: We'll have to get along a little more rapidly than we are.

Mr. Jones: Just one moment, if Your Honor please.

Q. Did you pick up any passengers, or haul any passengers that were not airline or airline employees?

(Testimony of Earl E. Stratten.)

A. Well, that I wouldn't know because the drivers handled that part of it and I wouldn't know definitely who they [86] were hauling.

Q. Well, do you know what the orders were with respect to who they haul?

A. To my knowledge the service was strictly an airline service.

Q. Not for the general public? A. No.

Mr. Winter: He said he didn't know, and then counsel——

The Court: No, he asked him, that's all right.

Mr. Jones: You may cross examine.

### Cross-Examination

By Mr. Winter:

Q. Now you said you didn't know the—what passengers the drivers would pick up, that was what you said just a minute ago?

A. That's right.

Q. Then, of course, you wouldn't know what route he took going out there, would you, if you didn't know what their policy was?

A. That's right.

Q. And if they went out the same route all the time, or ninety percent of the time, you wouldn't know that? A. No, I wouldn't.

Q. It may be a fact. A. It may be a fact.

Q. Now where—you say the garage is up—located up on Ninth and Lenora, isn't it?

A. 2109 Eighth Avenue.

Q. Is that about Ninth and Lenora—Eighth and Lenora? A. Yes.

(Testimony of Earl E. Stratten.)

Q. Where is the airline offices located—I don't mean the airline offices, I mean the Gray Line Tours' office?

A. That is—the Gray Line Tours' office is in the garage.

Q. The garage and office is in the same building?

A. That's right.

Q. And all the cars—all the limousines are stored there, except when they were sent on these scheduled flight trips, is that right? A. Yes.

Q. Now, you say that at times, if you didn't get a call, particularly where there was a scheduled flight say at eight o'clock and you didn't get a call you didn't send a limousine? A. That's right.

Q. And of course you don't know that the flight itself might have been cancelled and maybe you didn't get a call, is that right? A. That's right.

Q. Yes, so that whenever there was a scheduled flight that was leaving, did you ever know of any time that the passengers—the airplane left without any passengers that you didn't haul in all of this time, this four years involved here?

A. I don't quite get the question.

Q. Well, in all the four years here involved, was there ever a time that there was an airplane left on a flight, a scheduled flight, that you didn't go to the airport with your limousine?

A. Yes, there were times when that happened.

Q. How many times would you say? Twice?

A. During the four years?

(Testimony of Earl E. Stratten.)

Q. Yes, during four years, four times 365 days?

A. I would say that we could figure an average of at least one percent of the planes departing during that time that we don't have passengers for.

Mr. Winter: One percent of the time. I think that's all. The rest was covered in the pretrial order.

#### Redirect Examination

By Mr. Jones:

Q. If Boeing Field was closed down for weather or any other purpose and you were picking up passengers from another [89] airport, Paine or Seattle—Tacoma did you send any vehicle then to pick up passengers then at Boeing?

A. No, not if Boeing Field wasn't being used, and they were using an alternate airport, we sent the cars to the alternate airport.

Mr. Jones: That's all.

Mr. Winter: Just one question.

#### Recross-Examination

By Mr. Winter:

Q. I will show you what has been marked for identification pretrial exhibit 9, and will ask that it be marked for identification Defendant's Exhibit A-3. That's the stipulated sample of the drivers' scheduled airport, the plaintiff's scheduled airport fares which was furnished drivers. That's a copy of the airport fares' schedule furnished the drivers, is that right?

A. Yes, that's the copy they—

(Testimony of Earl E. Stratten.)

Q. That was furnished by you as dispatcher, or the Company to the drivers, was it not?

A. To the driver, yes.

Q. And that was the basis upon which they collected fares from the passengers, wasn't it?

A. That's right. [90]

Mr. Winter: Yes. That's all. We will offer in evidence the plaintiffs—the defendants' exhibit A-3.

The Court: It will be admitted.

(Whereupon document referred to was admitted in evidence and marked Defendant's Exhibit A-3.)

The Court: Now you may step down.

(Witness excused.)

Mr. Jones: I'll call Mrs. Turnpole. [91]

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### ANITA TURNPOLE

produced as a witness on behalf of the Plaintiffs, after being first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Jones:

Q. Will you please state your name in full?

A. Anita Turnpole.

Q. Miss Turnpole, will you speak just a little louder so that all can hear you.

A. All right.

Q. Where do you live?

A. Here in Seattle, 1214 Alki Avenue.

Q. And during the war did you work for the Gray Line Tours?      A. That's right.



(Testimony of Anita Turnpole.)

Q. And when did you go to work for them?

A. In November of 1942.

Q. And how long did you continue?

A. Until January of 1946.

Q. And during that time what were your duties?

A. As dispatcher and some office book work.

Q. Now, in your line of duty as dispatcher, did you have——

Mr. Winter: Mr. Jones, may I ask a question. If this is another dispatcher, you had one dispatcher and if her testimony is going to be the same as the last [92] witness, I'll stipulate that her testimony will be with respect to the later period the same as the previous witness.

Mr. Jones: I think that that will be entirely the same covering the period from the time she took over. Just let me look at my notes a minute, I don't think there's a single other thing in her testimony to take up.

Mr. Winter: Particularly, in view of the fact that it is covered by the pretrial order.

Mr. Jones: Well, there are some things that aren't. Just one minute to check these points, Your Honor.

The Court: Yes.

Mr. Jones: Yes, the testimony would be the same, Your Honor, for a different period.

The Court: Very well, it will be understood that her testimony corroborated the testimony of the other witness.

(Witness excused.) [93]

HERBERT G. TURNPOLE

produced as a witness on behalf of the Plaintiffs, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Jones:

Q. Will you state your name in full to the reporter?

A. Herbert G. Turnpole.

Q. Mr. Turnpole, where is your home?

A. Seattle.

Q. Are you—who are you employed by?

A. Gray Line Tours.

Q. How long have you worked for them?

A. Since 1934.

Q. And what's your work? A. Driver.

Q. Were you a driver from October the 10th, 1941 to and through September the 30th, 1944?

A. I was.

Q. During that time did you drive on the limousine service for the airport? A. I did.

Q. What orders were issued to you with respect, if any, to route to be followed? [94]

Mr. Winter: Do you mean the first instance or any time during this period?

Q. During that period, did you ever get orders as to any route to follow between Boeing Field and down town Seattle? A. No sir.

Q. Any streets specified that you'd have to run along? A. None, only in the zone.

Q. Now in coming in from the airfield toward

(Testimony of Herbert G. Turnpole.)

town, toward the hotel district, if a passenger wants to get out before he got there, how could you handle it?

A. We'd let him out wherever he designated.

Q. Supposing it should take you off of the shortest course between the two places, what would you do?

A. Take him where he says, if it was in the zone.

Q. He could pick the place he wanted to get out.

A. Yes——

Mr. Winter: If it is in the zone.

Mr. Jones: If it's—well, that's——

The Court: Just a minute, Mr. Jones. Address your remarks and objections to the Court, Mr. Winter.

Mr. Winter: Yes, Your Honor.

Q. What zone do you refer to?

A. What zone—what route?

Q. Yes, what zone do you——

A. The one that is designated by the airlines, the downtown [95] business district to the airport.

The Court: Well, what was this downtown business district?

The Witness: Well, it was designated, sir, as Ninth Avenue on one side, and Lenora Street on another, and the waterfront on another, and Boeing Field——

The Court: Lenora Street to the north, was it?

The Witness: The street to the north was Lenora, yes sir.

(Testimony of Herbert G. Turnpole.)

The Court: And Ninth Avenue was to the——

The Witness: To the east, waterfront to the west and Boeing Field to the south.

Q. Now, during those years that I mentioned to you, if you went to one hotel and got the passengers to go out to the airport—maybe I'd better back that up. Strike that. Where did you get the orders for your trips? A. From the dispatcher.

Q. Did you ever get an order where there was—where all the passengers were just picked up from one point, all came from one place? A. Yes.

Q. Then in cases like that what did you do?

A. Go there and load the car and go to the airport or vice-versa, whichever way it was.

Q. Did you pick them up and there were other points where [96] you also at other times picked up, did you go to those other points or get all your load at one place? A. No sir.

Q. Did you ever make trips in either direction without orders from the dispatcher?

A. No sir.

Q. Did you ever deadhead in either direction?

A. Yes sir.

Q. What did the ordinary person say to you, or how was your—how did you collect your fares, what did you say in collecting the fare?

A. Well, we collected our fares in advance when we loaded our passengers, usually it was we would ask them for ninety cents or eighty cents, or whatever the fare was.

(Testimony of Herbert G. Turnpole.)

Q. Did any of them ever ask you if it included a tax?      A. Once in a great while, yes.

Q. Can you give any estimate of the percentage of people that have personally asked you whether the tax was included?

Mr. Winter: Well, if the Court please, it doesn't make any difference, I think it is immaterial.

The Court: Oh, he may answer.

A. I would say, oh, probably, one out of a hundred.

Mr. Jones: You may cross-examine. [97]

#### Cross-Examination

By Mr. Winter:

Q. You say—when did you go to work driving the limousine service to the airport, when the service was first commenced?

A. When the service first started, sir.

Q. And at that time your instructions were—you were given instructions as to what your duties were in connection with your job, isn't that right?

A. Yes sir.

Q. And you were given instructions as to what the pickup points would be?      A. That's right.

Q. And you were also given instructions that you were not allowed to pick up any other passengers other than those designated, and to take them direct to the airport?      A. That's right.

Q. And you were not allowed to deviate from this route—this general route out to the airport. Isn't that right?      A. Yes, in the zone.



(Testimony of Herbert G. Turnpole.)

Q. In the zone. And that zone was designated in the agreement between the airlines and your Company? A. Yes sir.

Q. That's the way you understood it. Isn't it a fact that the majority of times you followed one particular route going [98] out there to the airport?

A. Well, I wouldn't say we did.

Q. I'm talking about——

A. That's right, when we first started, the first year or so we made many pickups, in fact we picked up at practically all downtown hotels. A lot of—a great many times we would end up over on First Avenue, then naturally we would go First Avenue to the airport, that is to Lucille Street and then over to the airport.

Q. Airport Way, you finally arrived at Airport Way?

A. You can't get to Boeing Field without going on Airport Way.

Q. Either towards airport or going around the field, it would be out of the city limits?

A. That's right.

Q. And your other stops, you had designated pickup stops going to the airport, and then on your way in you would let passengers drop off at any point they wanted to in the business area?

A. That's right.

Q. Now—about what—did you use to work as a taxi cab driver before? Did the company have any rules, or did they have any rules with respect to gratuities to employees driving these limousines?

(Testimony of Herbert G. Turnpole.)

Mr. Jones: Now, I don't know anything about that—but I think it is immaterial.

The Court: I don't know what the purpose of the question was.

Mr. Winter: Well, I think it's merely information of what the situation is here, that——

The Court: You mean whether he could accept tips or something of that kind?

Mr. Winter: Tips, yes, Your Honor. I have in mind that I—it's very seldom that I wouldn't. I may ask the question, Your Honor—I——

The Court: Oh, we'll probably save time by letting him answer, I can't see the materiality of it, though.

Mr. Winter: I'll withdraw it.

The Court: You knew what the fare was, the passenger fare independent of the tax?

The Witness: Yes.

The Court: That was how much, do you know?

The Witness: Well, it varied. At first it was seventy-five cents and five cent tax; then there was another raise, and then I think it went to ten percent tax, and then the fifteen percent tax, something like that.

The Court: In order to make even money sometimes, they added—— [100]

The Witness: That's right, they added two pennies to the seventy-five cents when the fifteen percent went in.

Mr. Winter: In that connection, I want your Honor to understand, I think the pretrial order will

(Testimony of Herbert G. Turnpole.)

show that only the tax—the difference—the actual percentage of tax had been assessed and collected in this case.

The Court: Yes, I know.

Mr. Winter: That will be shown by the——

The Court: Yes, I realize it.

Mr. Winter: That's all.

Mr. Jones: Thank you.

(Witness excused.) [101]

Mr. Winter: Your Honor, I have one question. May I ask the witness who just left the stand, this one question from where he sits?

Q. I think you stated that one in a hundred asked you about what the fare was. If a passenger asked you about what the fare was what would you say, respecting the fare and tax?

A. I never mentioned the tax, sir, only when they would ask if there was a tax included in it.

Q. Then you told them there was?

A. That's right.

Mr. Winter: That's all. I just wanted to get it straight. [102]

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E. I. BRENT

produced as a witness on behalf of the Plaintiffs, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Jones:

Q. Mr. Brent, will you state your name in full to the Reporter?      A. Ellery I. Brent.

(Testimony of E. I. Brent.)

Q. Are—what profession are you a member of?

A. Certified Public Accountant, State of Washington.

Q. When did you become a Certified Public Accountant?      A. In May of '46.

Q. And prior to being a Certified Public Accountant, what line of work did you follow?

A. Public Accountant—licensed public accountant, State of Washington.

Q. And when—do you work for the United Air Lines?      A. No.

Q. I don't mean United Air Lines—I mean for the Gray Lines.      A. No, I'm independent.

Q. Gray Lines?

The Court: He says he's independent.

Mr. Jones: Oh, I understood—yes, I see. [103]

Q. Well, do you perform services for the Gray Lines?      A. That's right.

Q. How long have you been performing services for the Gray Lines?

A. Since June, 1942.

Q. Since June of '42?      A. On my own.

Q. On your own? Did you—were you, prior to that time, were you employed by some—

A. I was employed by a Certified Public Accountant of Seattle.

Q. And did he do work for the—

A. Yes.

Q. So, either as a Certified Public Accountant, or an Accountant in your own right, or as an employee for this other accountant, how long have you

(Testimony of E. I. Brent.)

been associated with the accounts of the Gray Line Company?      A. I do not remember that.

Q. Well, put it this way, were you doing work for them in one capacity or another on October the 10th, 1941?

A. Yes, I was an employee of the service——

Q. And since you have been doing it?

A. Yes.

Q. Now, have you gone through the records of this Company and made a computation of the amount of tax on transportation paid by the airlines themselves, on billings from the Gray [104] Lines from October the 10th, 1941, to September the 30th, 1944?      A. I have.

Q. Do you have any statement of that computation with you?      A. Yes.

Q. May I hand a copy to Counsel? Do you have another copy?      A. Yes.

Mr. Winter: I have not—this is new to me.

The Court: Well, this is the item that was mentioned in your opening statement.

Mr. Winter: Yes, your Honor, but it has never been mentioned before, either in the pretrial hearings or anything else, and we're going to have to object to——

The Court: Well, I don't see why you should object at all, Mr. Winter; don't see any basis for an objection here, because the statement, as I understood to be made, virtually conceded that this is an item upon which the tax was probably assessed and collected, this thirteen hundred and some dollars.



(Testimony of E. I. Brent.)

Mr. Winter: Well, of course, that may be true, your Honor. Still, on the other hand—still, on the other hand it—we don't want to be bound by the fact that that is all of the amount which the airlines paid. In other words, we don't concede—we contend that—— [105]

The Court: Oh, you're not bound by the fact—by that fact, that's an independent fact to be established otherwise as to whether the remainder of this fourteen thousand dollars was their funds or was funds that were collected from passengers.

Mr. Winter: No, they were funds collected from the airlines. In other words, we don't want to be bound by the—that they only collected thirteen hundred and fifty-nine dollars and sixty-four cents from the airlines.

Mr. Jones: We take it, we were entitled to a—the claimed refund should have been specific and should have alleged this new ground, so that we could check those records and determine, and certainly the books should be here so that they might be examined even in open Court, if your Honor would deny that. We have no objection only for the purpose of merely conceding that this amount is not taxable, that that is merely the purpose and we're not bound by the balance of the tax, we don't concede that the balance of the tax is not——

The Court: My understanding is just the reverse; it's not being offered for the purpose of showing that it's not taxable, but it's an admission that this much of that sum was taxable.

(Testimony of E. I. Brent.)

Mr. Winter: Well, if it's an admission that just that amount was taxable, without binding upon [106] the government that the—that all of the balance, we don't concede that all of the balance was collected from the other passengers. We cannot concede it, because it may be that they collected a great deal more than this from the other passengers. It's merely a concession that they admit that this amount was collected from the passengers, I mean from the other bus companies.

Mr. Jones: It's of no importance to my case whatever. That will be all. Thank you very much.

(Witness excused.)

The Court: Do you have another short witness?

Mr. Jones: I don't believe—that's all we're going to call. That's our case, your Honor.

The Court: How much rebuttal have you?

Mr. Winter: I just have the exhibits to introduce, your Honor.

The Court: There are quite a number of exhibits that have not been admitted.

Mr. Winter: Yes, I am going to offer them.

The Court: There's five.

Mr. Winter: Yes, your Honor.

The Court: Tables of Pan-American Airways, and so forth. [107]

Mr. Winter: Yes, your Honor.

The Court: Do you have any objection, Mr. Jones, to that offer?

Mr. Jones: I have objections to—I made one to 9, and I have—no, not to 9—

The Court: Let's deal with five first.

Mr. Winter: Pretrial exhibit 5.

Mr. Jones: Well, five isn't five the City Ordinance, oh, yes, I see. Pretrial five.

The Court: Yes. The time table of Pan-American Airways, and the United Airlines and Northwest Airlines.

Mr. Jones: Well, our only objection to them—I'm not going to insist on, but I would like the record to note that those were self-serving, or not self-serving, they are hearsay as far as we are concerned. We didn't publish those airline tables, and there is no evidence that we were in any way consulted about their being published—we feel that they are incompetent, irrelevant and immaterial, but we have no objection to the Court—

The Court: They will be admitted.

(Whereupon, documents referred to were admitted in evidence and marked Defendant's Exhibit A-4.)

The Court: Now then as to 7. [108]

Mr. Jones: No objection.

The Court: That will be admitted and properly marked in accordance with the practice.

Mr. Winter: That will be A-5.

(Whereupon, document referred to was admitted in evidence and marked Defendant's Exhibit A-5.)

The Court: And 8.

Mr. Jones: No objection.

The Court: It will be given an appropriate marking.

(Whereupon, document referred to was admitted in evidence and marked Defendant's Exhibit A-6.)

The Court: That one seems to be Exhibit 10. The next one seems to be 10.

Mr. Jones: Ten—no objection.

The Court: That likewise will be admitted.

(Whereupon document referred to was admitted in evidence and marked Defendant's Exhibit A-7.)

Mr. Winter: 11.

Mr. Jones: No objection.

(Whereupon document referred to was admitted in evidence and marked Defendant's Exhibit A-8.) [109]

The Court: 12.

Mr. Jones: No objection.

(Whereupon document referred to was admitted in evidence and marked Defendant's Exhibit A-9.)

The Court: Then thirteen.

Mr. Jones: No objection.

(Whereupon document referred to was admitted in evidence and marked Defendant's Exhibit A-10.)

The Court: That apparently takes care of—

Mr. Jones: No, fourteen, sir. If fourteen was introduced, I—

The Court: Well, fourteen——

Mr. Jones: Oh, I made an objection to it then.

The Court: Yes.

Mr. Winter: And now, your Honor, pretrial Exhibit 16——

The Court: The map of Seattle.

Mr. Winter: Well, that was the Government's map, but——

The Court: Is it in evidence here with——

Mr. Winter: It's a smaller map and I'm going to ask the witness, in view of the situation, one question [110] with respect to this map, a Government witness, to identify it.

The Court: Very well. That takes care of all the exhibits.

Mr. Winter: That takes care of all of the exhibits. [111]

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### HARRY D. EDWARDS

produced as a witness on behalf of the Defendant, after being first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Winter:

Q. Will you state your name, please?

A. Harry D. Edwards.

Q. And what is your occupation, Major?

A. Deputy Collector.

Q. The District of Washington?

A. District of Washington.



(Testimony of Harry D. Edwards.)

Q. And where do you reside?

A. Seattle, Washington.

Q. Were you the investigating officer who investigated the tax liability on transportation of persons by the plaintiffs in this case?

A. I was.

Q. In connection with that investigation, did you secure a map what has been marked for identification, Defendant's exhibit——

The Court: It's marked pretrial exhibit number 16.

Q. Showing you what has been marked on there in red pencil or crayon, will you state when that was placed on there? [112]

A. That was placed on there shortly before May 1st, 1945.

Q. Where did you get the—what was the occasion for making that marking on that map?

A. I was trying to tell exactly what the downtown area referred to in this case was.

Q. Are you talking——

A. Yes, I was at the airline—at the Gray Line offices and I talked to a driver of Gray Line and had him tell me and show me what the downtown area was, and so marked it out on this map at that time.

Q. And you marked it out in his presence from what information you obtained there?

A. Yes.

Mr. Winter: We will offer in evidence——

The Court: Does that correspond to the testimony that was given?

(Testimony of Harry D. Edwards.)

Mr. Jones: Not exactly. I want to object to it on several grounds. One, that there is no showing that the driver, whoever he was that informed Mr. Edwards about that, knew, or that he was an agent for Gray Lines for the purpose of making such admissions that are binding on it. It's incompetent, irrelevant, immaterial, the way it comes into evidence—it's purely hearsay.

The Court: Well, I shall sustain the objection if it differs from the testimony that went in without [113] objection.

Mr. Winter: It does not differ at all.

Mr. Jones: I think——

The Court: Some driver testified where the boundaries were, and of course if they had instructions they were to make deliveries within the downtown area, or pickup.

Mr. Jones: If it doesn't differ, I don't know a thing about it.

Mr. Winter: Well, it's my understanding this course corresponds with the description of the downtown area described in the United Airlines' letter, does it? Do you know?

The Witness: The United—I'm not sure about that United Airlines' letter, sir. Well, it doesn't agree with the testimony given here today, if that's what you mean.

Mr. Winter: In what respect? What is the difference in the area?

The Witness: That lists Virginia Street as the northern boundary. Lenora is the next street north.

(Testimony of Harry D. Edwards.)

The driver at the time I made that out told me that Lenora was the street that led directly to the garage. There are no hotels on Lenora Street. The other difference is that that is marked along First Avenue, whereas they [114] say to the waterfront. I was told at the time that First Avenue was the downtown area.

Mr. Jones: Well, I shall have to urge my objection, your Honor, because the——

The Court: Oh, it's not very material either way; the variation is so minor, apparently. I think the Court asked the question and there was no objection, of the other driver, what he considered the downtown area. If there is any great dispute upon that, I will permit the plaintiff to reopen the case, or the defendant——

Mr. Jones: Well, I have the driver here, and I'll call him.

The Court: No, I'm not so much interested in the driver as I am someone in an executive position, testifying what they meant by the downtown area. Will you let me have that contract? If you can agree upon what the downtown area was—it has been mentioned so many times.

Mr. Winter: Your Honor, the contract provides on page one—"For the purpose of this agreement, said Downtown District shall be considered to be the area in the City of Seattle bounded on the North by Lenora Street, on the East by Ninth Avenue, on the South by Boeing Field and on the west by the waterfront of Puget Sound." [115]

(Testimony of Harry D. Edwards.)

The Court: That's on page 1?

Mr. Winter: Yes, your Honor.

The Court: Oh, I see.

Mr. Winter: I have no objection to that being considered, and I'll withdraw the exhibit, if your Honor please, I don't think it's that important. However, I want to ask the witness one question.

Q. When—were you furnished in your investigation with a copy of this agreement—the written agreement between the——

The Court: Plaintiff's Exhibit 1.

Q. Plaintiff's exhibit 1, between the United Airlines Transportation Corporation and Gray Line Tours, Inc., a Washington corporation?

A. No.

Q. When was the first time that you saw that contract? A. About ten days ago, here.

Q. In my office? A. No.

Q. No—was it at my office or was it here in Court, at the time of the pretrial?

A. I believe it was in your office, Mr. Witner.

Q. Yes, I think it was.

A. The first mention of it, I believe, was made there.

Q. Well, wasn't that after we had had the hearing and then [116] we started on the pretrial conference? A. That's right.

Q. Yes, with Mr. Jones? Yes, it was shown to us here in Court briefly, and then we read it when we got to the pretrial—that was after the first hearing in this case. A. That's right.



(Testimony of Harry D. Edwards.)

Mr. Winter: It's satisfactory to me, your Honor, that——

The Court: Very well.

Mr. Winter: That's all.

Mr. Jones: That's all for us, too.

(Witness excused.)

Mr. Jones: If the Court please, and if it meets with counsel's ideas in this, I would like to request the privilege of presenting the case on oral arguments rather than briefs.

The Court: That's agreeable with the Court. How much time would you want?

Mr. Jones: We could finish, well before 5:00, I'm sure. I know I can finish well before five.

Mr. Winter: I think——

The Court: Well, I think we'll take an intermission then until twenty minutes after three. [117]

Mr. Jones: Thank you.

The Court: And the exhibits will be available, if you want them. I want to re-read the stipulation.

(Recess.)

(Whereupon argument by Mr. Jones.) [118]

### DECISION OF COURT

The Court: I, Mr. Jones, have been impressed favorably with the manner in which you have presented this case, both from the point of ability and from the point of thoroughness. But I am not persuaded that your client can prevail in the case, and I will, therefore, not take the time to listen to an argument from the Government, because I am clear



in my own mind that I shall have to deny the relief that you seek and dismiss your complaint.

It's only fair—you may be seated—it's only fair that I should state the reasons that impel me to do this.

The facts in the case are not seriously in dispute; pretty well set up in the pretrial order resulting from pretrial conference. There are some contentions that the parties raise and set forth in this pretrial order, but generally speaking, there isn't any very serious dispute upon the facts.

I shall adopt, of course, all of the stipulated facts in this pretrial order, as the facts that the Court finds in this case. And applying those, plus the evidence given, supplementing them, and the evidence was all given on behalf of the plaintiff and none by the Government, I still cannot bring myself to the position that the plaintiff is entitled to a recovery; and I might say, parenthetically, it's not because of any preconceived notions that [119] I entertain by reason of having been a member of Congress in 1941 when this Act was passed. I remember the Act, but recall nothing whatever concerning the specific section in question, and it's outstanding in my mind more because it came on the floor under a rule that is commonly referred to as a gag rule, and no member who had not been a member of the Ways and Means Committee or the Rules Committee, could do anything other than vote Yes or No, and it came under limited debate, and as I try to look back now I have no recollection whatever concerning the matter of this five per cent transpor-

tation tax that was included in a bill that was many pages in length and covered many, many articles.

But, when we examine the law, and it has been very thoroughly quoted in argument, and I will refer specifically to Section 3469 of 26 U. S. C. A. of the Revenue Act, it says—and I'm only going to read a small part of it—"such tax shall apply to transportation by motor vehicles having a passenger seating capacity of less than ten adult passengers including the driver, only when such vehicle is operated on an established line."

It becomes evident by the very reading of that language that we are put to something further when we attempt to apply this Act of Congress, and that is to secure a definition that's satisfactory and reasonable, and which can be understood by the public as to what constitutes an [120] established line.

Undoubtedly, the Commissioner of Internal Revenue found that problem confronting him soon after the effective date of this Act. So he promulgated a regulation, in the nature of a definition, appearing in the regulations as Section 130.58, under Motor Vehicles with Seating Capacity of less than ten. That definition is binding upon this Court and upon all the courts, if it is sufficiently clear to meet the situation that is presented by the facts that we now have for consideration. I don't think that a court would be permitted to go to the dictionaries or any other outside source for a definition. I say this because of the holding by the Supreme Court, at least upon one occasion some time ago, and then again here in a case just out, the last set of clip

sheets, April 14, 1947, No. 68. And in this latter case, the question for determination was a proper definition for the word "property." The Act of Congress used the term "property." The Commissioner had issued a regulation, wherein he defined what property meant, and the confusion that arose in this case of *Crane vs. Internal Revenue*, was the distinction that would have to be made between the words "equity," because this involved a mortgaged piece of realty, and the word "property" for the purpose of levying tax. The Court's opinion, written by the Chief Justice, has this to say: "We think the reasons for [121] favoring one of the latter constructions are of overwhelming weight. In the first place, the words of the Statute, including revenue acts, should be interpreted, where possible, in their ordinary, everyday sense." Then, omitting parts that are not relevant here, the Court goes on: "the quoted provision of the regulation"—that is the definition of "property," "has been in effect since 1918, and as the revelant statutory provision has been repeatedly reenacted since then, in substantially the same form, the former may, itself, now be considered to have the force of law." The statement there relating to Internal Revenue Regulations can be applied a hundred per cent to the situation here, with regard to the definition, because since 1941 and there have been at least two amendments to the law, each time increasing the tax, and Congress has by implication accepted the Commissioner's regulation on "Established Line."

Defining the definition as fixed by the regulation that I have referred to, defines the term "operated on an established line" and it says, and I'm quoting: "It means operated with some degree of regularity between definite points. It does not necessarily mean that strict regularity of schedule is maintained." Applying the evidence we have here, we must find it does not necessarily mean that a full run is always made; it does not necessarily mean that a particular route is followed; it does not [122] necessarily mean that intermediate stops are restricted. When read as I have read it here, and I fully intended to read it fairly, the phrase "it does not mean" applies to each one of these subdivisions, or each one of these clauses in this definition, which reads: "The term implies that the person rendering the service maintains and exercises control over the direction, the route, the time, the number of passengers carried" and so on. Reading further: "It also implies the primary contract between the operator and the persons served, is for the transportation of a person not for hire or for use of the vehicle."

In the instant case, we have a situation that's distinguished from the ordinary service rendered by a public carrier. We have a situation giving rise to a service to a very limited part of the public, those who made use of airplanes in traveling, and not even all of them. There is a contract, between the airplane company and the plaintiff in this action, in one instance a written contract, in the other two, a similar oral contract, wherein it was agreed that



they would render service to the passengers carried, or to be carried by the airplane companies; and while the agreement does not limit to traveling a particular street or road or highway, it does definitely impose upon them the responsibility that whenever services were needed to carry passengers from the business district [123] of Seattle to the airport, or the Boeing air field, such passengers as might want to leave and make use of the service, or to return them, always had it available. I might elaborate upon that if it would help to clarify the problem, but I am inclined to believe that it would not. Under this definition any consolation that the plaintiff can get from the language, to the effect that the term implies, that the person rendering the service maintains and exercises control over the direction, the route, the time and the number of passengers to be carried does not avail here, because the plaintiff didn't have that power independent of his obligations that he assumed to the airplane companies. All of the other tests of this term—"carriage for hire," are, it seems to me by the facts admitted in the Pretrial Order and the evidence offered here, clearly established.

It becomes totally unnecessary for the Court to go to the second phase of this case, if this were one of those situations where the facts did not support a finding that this was a service for hire; then we'd have the question as to whether application should be given to provisions of the statute—I think enacted at the same time this five per cent tax was enacted in 1941—providing in substance that, if one



couldn't disburse the tax erroneously collected to those who paid it, then he would be left without a remedy [124] to recover it, because being a tax paid to the Federal Government, it would have to remain the property of the Federal Government, rather than be taken to enrich the person who erroneously collected it. The Act of Congress in that regard is quite the contrary to the decision in the Bow case, and whether the decision in that case gave rise to this congressional enactment or not, I am not informed, but the language is quite plain—this—in this case—I say, if the finding on the primary question here were to the contrary from what I do find, then the Court would, I feel, be forced, under the facts in this case, to find that there still could not be a recovery because the parties from whom the collections were made were so numerous and unknown, and the money though collected in good faith and paid in good faith to the government, even though it were erroneously collected couldn't be recovered after it had once been paid. Making payment of it might be defeated if this were not an "established line," but that would be a matter, I think, rather for the Tax Court than for this Court, if there had been no payment made.

However, deciding the primary issue that this operation was within the definition, as the regulations set them forth, a service that was subject to the tax at one time in the earlier years here involved of five per cent, and then the ten per cent and then the fifteen per cent, and the [125] Court

having so found and being satisfied that the record—as made in this case—supports such finding, there is nothing to do but deny the relief sought and dismiss the petition.

Before I conclude let me say that I have tried to give every spare moment that I had to this matter since it was first submitted to me. All of these exhibits offered in this Pretrial Order have been in the possession of the Court since they were first submitted about ten days or two weeks ago, because I realize the significance of this case, particularly the plaintiff. A settlement of this issue here may not be an end to the problems that still exist between the plaintiff and the government as to similar tax, subsequently collected, and I don't know just what they may be. I am assuming that either the plaintiff since they took the position upon advice, which that given in the best of faith, to the effect that they are not liable for this tax, and have no longer been collecting it may still be held liable; or on the other hand they may have been collecting it, and may have assumed that it was their property and just that much of an increase in rates. I'm not going to have to pass upon that issue, at least not in this case. While I can feel reasonably sure of my findings of facts and conclusions, I am never positive of them, nor do I have such pride of opinion concerning them that would cause me to [126] believe that it would be a mistake to have an Appellate Court review the same facts and determine whether I was right or wrong in my conclusions. I can't hold otherwise under the sit-

uation as presented. The definitions laid down by the regulations, and the very recent expression by the Supreme Court convince me the plaintiff is not entitled to the relief sought. They announced the law in this case to the effect that these regulations have the force of law and that commits the Court to the definition as set forth by the Commissioner. When the definition is applied to the facts here, I can do nothing other than that which I have already announced.

You may prepare findings and conclusions of law and decree and submit them, suiting your own convenience, I'd say within the next thirty days.

Mr. Winter: Yes, your Honor, under the new rules the Attorney General's office is requiring us to submit our proposed findings back there, but I will do it as soon as possible.

The Court: Well, I suggest speed, because it doesn't mean so much to this Court now, but it might mean quite a little bit to the taxpayer if this is dragged out for a long period of time.

Mr. Winter: I will make it as soon as possible, your Honor, and submit it to counsel, your Honor.

The Court: And I want to compliment counsel on both sides for the great amount of labor that you have saved the Court and saved yourselves by your cooperative spirit in which you entered into the pretrial conference, and finally submitted the major part of the material facts here, so we didn't have to trouble ourselves with them.

## CERTIFICATE

I, Russell N. Anderson, official court reporter for the above-entitled court, do hereby certify that the foregoing is a true and correct transcript of the matters therein set out.

/s/ RUSSELL N. ANDERSON,  
Official Court Reporter. [128]

[Endorsed]: No. 11736. United States Circuit Court of Appeals for the Ninth Circuit. E. Royce, B. Royce and A. H. Wenck, doing business as Gray Line Tours, Appellants, vs. Clark Squire, Collector of Internal Revenue for the District of Washington, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

Filed September 24, 1947.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

In the United States Circuit Court of Appeals  
for the Ninth Circuit

No. 11736

E. ROYCE, B. ROYCE and A. H. WENCK,  
d/b/a Gray Line Tours,

Appellants,

vs.

CLARK SQUIRE, United States Collector of Internal Revenue for the District of Washington,  
Appellee.

STATEMENT OF POINTS UPON WHICH  
APPELLANTS INTEND TO RELY ON  
APPEAL

The Appellants hereby adopt the Statement of Points filed by them in this case with the Clerk of the District Court of the United States for the Western District of Washington, Southern Division, and on this appeal to the United States Circuit Court of Appeals for the Ninth Circuit the Appellants intend to rely on the points set forth in the said statement which is now included in the typewritten Transcript of Record on Appeal herein at pages 38 and 39 thereof.

/s/ RANDALL S. JONES,

Of Attorneys for the  
Appellants.

Due and legal service of the foregoing Statement of Points by receipt of a duly certified copy thereof,



as required by law, is hereby accepted in Multnomah County, Oregon, on this 30th day of September, 1947.

/s/ THOMAS R. WINTER,  
Attorney for Appellee.

[Endorsed]: Filed Oct. 2, 1947.

---

[Title of Circuit Court of Appeals and Cause.]

STIPULATION DESIGNATING PARTS OF  
RECORD TO BE PRINTED

Whereas, Appellants' Statement of the Points upon which they intend to rely on this appeal and their Application to be relieved from printing or reproducing the original exhibits in the printed Transcript of Record, each entitled in the above entitled Court, were served upon the appellee this 30th day of September, 1947.

Now, Therefore, the appellants and appellee, appearing and acting by and through their respective attorneys of record herein, hereby designate the entire Transcript of Record on Appeal, together with all of the Reporter's original Transcript of Proceedings and all the original exhibits, as the parts of record which they think necessary for a consideration of the points above mentioned, but further Designate Only the said Transcript of Record on Appeal and said Reporter's Transcript of the Proceedings as the parts of said Record that

need be printed in the printed Transcript of Record for the consideration of said points; and

It Is Hereby Stipulated and Agreed by and between the said parties hereto, appearing and acting by and through their said respective attorneys, that all of the exhibits introduced in evidence at the trial of the above entitled case may be considered in their original form by the above entitled Court in determining the questions involved in this Appeal; that for the reasons stated in said Application the said parties do not consider it necessary or practical to print or otherwise reproduce said exhibits in the printed Transcript of Record on Appeal; and the parties herein respectfully request the above entitled Court to consider each and all of the said exhibits in their original form in determining the questions on appeal herein as though the said exhibits had been printed or otherwise reproduced in the printed Transcript of Record, and further request the above entitled Court to make and enter an order granting appellants' said application.

Dated, September 30, 1947.

/s/ RANDALL S. JONES,

Of Attorneys for Appellant.

/s/ THOMAS R. WINTER,

Of Attorneys for Appellee.

[Endorsed]: Filed Oct. 2, 1947.

[Title of Circuit Court of Appeals and Cause.]

APPLICATION BY APPELLANTS TO BE RELIEVED FROM PRINTING OR REPRODUCING THE EXHIBITS

Comes now the Appellants and respectfully apply to and move the above entitled court for an order relieving the Appellants from printing or reproducing the exhibits in this case in the printed Transcript of Record on Appeal, and ordering that all said exhibits be considered by this court in their original form in determining the questions involved in this appeal without such exhibits being so printed or reproduced and as though they were fully set forth in said printed Transcript of Record. This application is based upon the ground that said exhibits are voluminous, that some of them are not of a printable type, that some of the others are not easily printable, that others are bundles, such as samples of billings or daily and monthly operating reports, that the inclusion of all of the exhibits in the printed Transcript of Record would make it extraordinarily long and that the cost would be greatly disproportionate to the convenience of having them all so included as, in all probability, there will be very little need to refer to most of them. This application is supported by the stipulation by the parties hereto filed herewith.

/s/ RANDALL S. JONES,

Of Attorneys for the  
Appellants.

## Order

Based on the foregoing application and the stipulation of the Appellants and the Appellee on file herein,

It Is Ordered, that the exhibits in the above entitled case need not be printed or reproduced in the printed Transcript of Record on Appeal, and that all of the said exhibits shall be considered in their original form by the above entitled court in considering and determining the questions involved in this appeal just as though said exhibits were set out in the printed Record.

Dated, October 2, 1947.

/s/ WILLIAM DENMAN,  
Judge.

Due and legal service of the foregoing application and form of Order by receipt of a duly certified copy thereof, as required by law, is hereby accepted in Multnomah County, Oregon, on this 30th day of September, 1947.

/s/ THOMAS R. WINTER,  
Attorney for Appellee.

[Endorsed]: Filed Oct. 2, 1947.





**In the United States**  
**CIRCUIT COURT OF APPEALS**  
**for the Ninth Circuit**

---

E. ROYCE, B. ROYCE and A. H. WENCK,  
doing business as Gray Line Tours,  
*Appellants,*

vs.

CLARK SQUIRE, Collector of Internal Revenue  
for the District of Washington,  
*Appellee.*

---

**BRIEF FOR APPELLANTS**

---

Upon Appeal from the District Court of the United  
States for the Western District of Washington,  
Southern Division

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R. T. JACOB,  
RANDALL S. JONES,  
917 Public Service Building,  
Portland 4, Oregon,  
*Attorneys for Appellants.*

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PAUL H. CHRISTIAN  
CLERK



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No. 11736

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**In the United States**  
**CIRCUIT COURT OF APPEALS**  
**for the Ninth Circuit**

---

E. ROYCE, B. ROYCE and A. H. WENCK,  
doing business as Gray Line Tours,  
*Appellants,*

vs.

CLARK SQUIRE, Collector of Internal Revenue  
for the District of Washington,  
*Appellee.*

---

**BRIEF FOR APPELLANTS**

---

Upon Appeal from the District Court of the United  
States for the Western District of Washington,  
Southern Division

---

**JURISDICTION**

During the period October 1, 1941 through September 30, 1944, Appellee assessed against Appellants transportation taxes, penalties and interest in the total amount of \$16,423.51, and Appellants paid the assessment to the Appellee. The taxes were purportedly as-

essed under Sec. 3469, *Title 26, U.S.C.A., (Internal Revenue Code)*, as added to the code by the "Revenue Act of 1941" and subsequent amendments thereto. (Tr. 3).

On November 30, 1944, Appellants filed with the Appellee a claim, properly and duly prepared upon the prescribed form, for a refund of the \$16,423.51, together with interest, as provided by Sec. 3471, *Title 26, U.S. C.A., (Internal Revenue Code)* (which Section was heretofore erroneously stated as Sec. 322). The Commissioner of Internal Revenue of the United States rejected this claim for refund on the 19th day of June, 1945. (Tr. 25).

On April 2, 1946, the Appellants filed with the District Court of the United States for the Western District of Washington, Southern Division, their complaint wherein they pray for a judgment against the Appellee in the principal sum of \$16,423.51, together with interest as provided by law (Tr. 2-4), and on July 22, 1946, the Appellee filed his answer to the complaint (Tr. 6).

Jurisdiction of all cases arising under the Internal Revenue Laws of the United States (including this case) is conferred upon the District Court by Sec. 41, (5), *Title 28, U.S.C.A. and Sec. 3800, Title 26, U.S.C.A.*

On June 16, 1947, the District Court (Leavy, J) made and entered its final judgment against the Appellants (Tr. 38-39).

Jurisdiction to review judgments of the district courts, in cases such as this, is conferred on this court

by Sec. 225 (a), Title 28, U.S.C.A.

Timely notice of appeal and Bond on Appeal were served on the Appellee and duly filed (Tr. 40, 41).

## STATEMENT OF THE CASE

During the times involved in this case the Appellants were engaged, at Seattle, Washington, in the business of transporting passengers in motor vehicles under the firm name and style of "Gray Line Tours, and the Appellee was and now is the United States Collector of Internal Revenue for the District of Washington. During all said times the Appellants had a contract (Ex. 1) with the United Air Lines Transportation Corporation to provide surface transportation services for air passengers of the United Air Lines, and the Appellants also had similar arrangements or oral contracts with Northwest Airlines and Pan-American World Airways (Finding VII, Tr. 26). From October 10, 1941 through September 30, 1944, seven passenger limousines were used by the Appellants in providing said service, and these are the only vehicles with which we are concerned in this case (Tr. 26).

Appellee assessed and collected transportation taxes from Appellants on the theory they were operating the said limousines "on an established line" within the meaning of Sec. 3469, *I.R.C.* Appellants instituted this action against the Appellee to recover the amounts collected, alleging that their said limousines "were not operated on an established line" (Tr. 3).

On the 1st day of May, 1947, this action was tried to the court without a jury. Witnesses were sworn and testified on behalf of the appellants, and the appellants introduced documentary evidence. A witness was sworn and testified on behalf of the appellee, and the appellee introduced documentary evidence. All the exhibits introduced are now in the possession of the clerk of this Court. Throughout the trial the appellants contended that the limousine service they provided did not amount to operating motor vehicles "on an established line" within the meaning of Section 3469 (a) of the *Internal Revenue Code*, which, as originally enacted, read as follows:

"*Transportation*—There shall be imposed upon the amount paid within the United States, on or after October 10, 1941, for the transportation, on or after such effective date, of persons by rail, motor vehicle, water, or air, within or without the United States, a tax equal to 5 per centum of the amount so paid. Such tax shall apply to transportation by motor vehicles having a passenger seating capacity of less than ten adult passengers, including the driver, only when such vehicle is operated on an established line."

(The per centum figure in the quoted statute was raised by amendments from 5 to 10 and from 10 to 15 within the period October 1, 1941 through September 1, 1944. No other change was made in the quoted portion of the statute within said period.)

The trial court made Findings of Fact in which it included only a portion of the facts bearing upon the question of whether or not in providing such limousine



service the Appellants were operating their said limousines on "an established line" within the meaning of the last quoted Section of the Internal Revenue Code. These findings are set forth as Paragraphs VIII through XVI of the Findings of Fact (Tr. 26-31). These findings omitted uncontroverted, important, material and ultimate facts bearing upon this question. These omitted facts are set forth in subparagraphs 1 to 15, inclusive, of the first objection to the Court's said findings (Tr. 34-37) and in Specification of Error II of this brief. (The Transcript pages set forth on Transcript pp. 34-37 after each of the said omitted facts refer to pages in the Reporter's type-written Transcript, which pages, however, are indicated by insertions in the printed Transcript of Record. The page references made to an omitted fact in Specification of Error I are to pages in the printed Transcript of Record.)

The trial court found and concluded that the Appellants were operating the limousines "on an established line" within the meaning of said Section of the Internal Revenue Code, and basing its judgment on said finding dismissed Appellants' complaint with prejudice.

The Appellants contend that inasmuch as the trial court undertook to make detailed Findings of Fact, it should have included in its Findings of Fact the omitted uncontroverted facts to which reference was above made. And, as in the trial court, the Appellants contend that the transportation services they provided during the said period did not amount to operating their said limousines on "an established line" within the meaning of said Section of the Internal Revenue Code.

Based on the general proposition that the furnishing of said limousine service did not amount to an operation of motor vehicles "on an established line" within the meaning of Sec. 3469, *I.R.C.*, the Appellants also contend: (1) said transportation service was specifically exempt from taxes imposed by said section; (2) that Appellants were not and are not liable for transportation taxes under the provisions of said section; (3) that the assessment and collection of said purported taxes, penalties and interest were and are illegal; and (4) that the Appellants' complaint should not have been dismissed.

In deciding this case the Court treated *Regulation 42, Sec. 130.58* as though it had the force and effect of law, and the Appellants contended at the trial and now contend that said Regulation does not have such force and effect.

During the trial the Appellee offered in evidence Exhibit No. A-1 (which is Pre-Trial Exhibit 14), which Exhibit is an inter-office communication of the United Air Lines, and the court received the said Exhibit in evidence over the objection of the Appellants that there was no evidence to show that the Exhibit was ever brought to the attention of the Appellants or that they ever had any knowledge of it or that it was intended for them to act upon and that it was hearsay as far as the Appellants are concerned (Tr. 59 to 63).

## **SPECIFICATION OF ERRORS**

### **I.**

The trial court erred in admitting in evidence Appellee's Exhibit A-1 (Pre-Trial Exhibit 14) over the Appellants' objection based on the following grounds:

"This Exhibit A-1 we object to on the ground that it is irrelevant and incompetent, and immaterial; on the further ground that it purports ('purports' and not 'supports' was the words used as shown on p. 16 of Reporter's Transcript of Proceedings) to be an airline inter-company communication. No evidence has been shown that it was ever brought to the attention of the plaintiffs or that they ever had any knowledge of it, or that it was intended for them to act upon, and on those grounds we object to it.

The Court: Did you save an objection in the pretrial—

Mr. Jones: General objection, if the Court please, on page 10, subject to any and all other objections, the general objections. Also on the ground that it is hearsay as far as the plaintiffs are concerned." (Tr. 62,63).

Exhibit A-1 is an office communication of the United Air Lines now in the possession of the clerk of this court. By an order of this court Appellants were relieved from the duty of printing the Exhibits. They do not have a copy of the form upon which the Exhibit was typed but the body of the Exhibit is as follows:

"Our limousines when enroute from the Airport to the City of Seattle take Airport Way, Highway US 99, to Dearborne Street. It will then go to any

hotel within an area west to First Avenue; north to Virginia Street; and east to Ninth Avenue. This will include service to practically all the downtown hotels.

When traveling from the city to the Airport it picks up at the Olympic Hotel and the Traffic Office. The limousine takes Fourth Avenue to Airport Way, then goes directly to Boeing Field.

Our limousines pick up at the Olympic Hotel, forty-five minutes before departure and at the Traffic Office forty minutes prior to departure.

/s/ J. R. Wanink''

## II.

The trial court erred in failing to include in its findings each and all of the following facts:

(1) Air line passengers being transported from Boeing Field were carried anywhere within the downtown district (bounded as set forth in finding XII) that they desired to go, and the limousines stopped anywhere within said district, at the request of a passenger, to let such passenger out (Tr. 61, 62, 109, 118, and 128).

(2) There were fifteen or more incoming and fifteen or more outgoing flights each day to and from Boeing Field (Tr. 58, 68, and 77).

(3) When the arrival of a plane was delayed the air line company would notify the Appellants' dispatcher of that fact, together with the estimated time of arrival of the delayed plane (Tr. 74).

(4) The information given Appellants' dispatcher by the air lines governed the departing time of Appellants' limousines. No trips were run without such orders from the air lines (Tr. 97 and 120).

(5) Appellants maintained no schedules of the departure of their limousine service (Tr. 103), and



they did not publish or post for the use or perusal of the general public schedules of the departures of the limousines from the airport or from the pickup points in the downtown area (Tr. 97).

(6) Appellants did not at any time advertise in the paper or by poster or in any manner their limousine service (Tr. 95).

(7) The schedules of the air line companies were used by the Appellants' dispatcher only for the purpose of planning so as to be able to handle the volume of expected transportation (Tr. 121).

(7½) The general public was not conveyed by means of the limousine service (Tr. 95 and 122).

(8) The air line companies had the power to specify the routes of travel, but they did not do so (Tr. 59, 96 and 99).

(9) Air line companies had the power to designate the pick-up points in the downtown area, and these were changed from time to time (Exhibit I—Contract with United Airlines; Tr. 63, 64, 69, 70, 96, 97 and 99).

(10) No public authority specified any route to be followed by Appellants' limousines, and Appellants had no certificate of convenience or necessity issued by Washington Department of Public Works or Department of Public Service (Tr. 94).

(11) No special facilities were provided at the airport for the limousines in receiving and unloading passengers. They performed this service in front of the administration building just as did the private cars and taxicabs, but while waiting at the airport the limousines would park in an area reserved for them and taxicabs (Tr. 64-67).

(12) Limousines not in use were stored at Appellants' garage located at 8th and Lenora (2109 8th Avenue) Seattle, Washington. Limousines dispatched to Boeing Field to meet incoming planes,



in most cases, went from Appellants' garage directly to field without going to or stopping at the downtown pick-up points. However, occasionally a car was dispatched from a hotel to meet an incoming plane (Tr. 119, 120 and 123).

(13) Although an airplane would be departing at a certain time, if the Appellants' dispatcher received no call for passengers to be transported to the plane, no limousine would be sent to the airport (Tr. 121).

(14) If all the passengers going to Boeing Field were at one downtown pick-up point the limousine would not go to any of the other downtown pick-up points before departing for Boeing Field (Tr. 117 and 129).

(15) When Boeing Field was closed down no limousine went there to transport passengers. They went directly to the alternate airport (Tr. 124),

for the reasons that each and all of the said facts are clearly established by uncontradicted evidence, and a proper and just determination of the question of whether or not Appellants' limousines were being "operated on an established line" within the meaning of Sec. 3469 of the *Internal Revenue Code*, cannot be made without taking into consideration all of these facts, along with the other facts set forth in the findings made by the court, and on the further ground that inasmuch as the trial court undertook to make a detailed statement of the facts bearing upon the said question, it was the court's duty to have included each and all of the foregoing facts in its findings, and the Findings of Fact show that the Court did not take into consideration the foregoing facts in making its Conclusions of Law and enter-

ing a judgment dismissing the Appellants' complaint (Tr. 33).

### III.

The trial court erred in making its Findings of Fact (Tr. 23-33) in that they are clearly erroneous for the reason they *omit* the material and uncontroverted facts set forth in Specification of Error II.

### IV.

The trial court erred in treating *Regulation 42, Sec. 130.58* as though it had the force and effect of law (Tr. 147-153), for the reason that the said Regulation is no more than the Commissioner's interpretation of Sec. 3469 of the *Internal Revenue Code*, and the regulation attempts to limit the meaning of the words "operated on an established line" used in said section of the *Internal Revenue Code*.

### V.

The trial court erred in making its Conclusion of Law I which is as follows:

"That during the period October 10, 1941, through September 30, 1944, the plaintiffs, in transporting passengers in their motor vehicles involved in this action, were operating said vehicles on an established line within the meaning of Section 3469 of the Internal Revenue Code (Title 26, U.S.C., Section 3469), and the Regulation promulgated thereunder." (Tr. 33)

for the reason that the evidence clearly shows Appellants were not operating their limousines "on an established line" within the meaning of said Code Section, and that

said conclusion is not supported by and is contrary to the evidence and is contrary to law, and on the further ground that said conclusion is based upon only a portion of the evidence, the facts set forth in Specification II having been disregarded.

## VI.

The trial court erred in making its Conclusion of Law II which is as follows:

“That the taxes assessed and collected were in all respects legal and in strict accordance with the law.” (Tr. 34)

for the reason that Sec. 3469 of the *Internal Revenue Code* expressly provides for the transportation tax imposed by said Code Section shall apply to transportation by motor vehicles such as said limousines “only when said vehicle is operated on an established line”, and the said limousines during the times involved in this case were not operated on an established line within the meaning of said Code Section, and for the further reason that the said Conclusion is not supported by and is contrary to the evidence and is contrary to law and the trial court in making said Conclusion misconstrued the meaning of the term “operated on an established line”, and on the further ground that said Conclusion is based on only a portion of the evidence, the facts set forth in Specification II having been disregarded.

## VII.

The trial court erred in making its Conclusion of Law III which is as follows:

"The judgment should be entered dismissing plaintiffs' complaint, with costs to the defendant to be taxed by the Court." (Tr. 34)

for exactly the same reasons as are specified in Specification VI.

## ARGUMENT

**Appellee's "Exhibit A-1" was erroneously admitted as evidence over Appellants' objection. (Tr. 62-63).**

Appellants are not bound by Exhibit A-1, a letter which was not addressed to them, and the terms of which were in no way communicated to them. There is no evidence showing knowledge on the part of the Appellants of the existence or terms of said letter.

A letter written by a person not a party to the suit is hearsay and inadmissible.

In *Simpson v. Smith and Barnes*, (1882) 27 Kan. 565,575, where a letter written between persons not parties was attempted to be introduced, the court held it was properly excluded.

"The letter from Dunscomb & Seaver was not itself the fact of possession, nor was it any fact, except that it was a mere letter; and as its contents were the mere statements of Dunscomb & Seaver, not under oath, its contents were incompetent to prove any fact or anything as against the defendants in the case."



In *McNairy v. Standard Life Ins. Co.*, (1938) 114 S.W. 2d 156, 158, a letter written by the Old Age Assistance Department to plaintiffs' attorney was offered in evidence. The court excluded the letter as evidence. In its opinion the court said:

"It (the letter) was properly excluded by the ruling of the court. It was not competent for any purpose."

"Exhibit A-1" was erroneously admitted as evidence and should not be considered in determining whether the Appellants' operation was on an "established line" within the meaning of the Internal Revenue Code.

**The Circuit Court of Appeals may review the evidence in this case.**

This court has the authority to review the evidence in this case.

In *Equitable Life Assurance Society of the United States v. Irelan*, (1941) 123 F. 2d 462, 464 (C.C.A. 9), this court considered the scope of its authority to review findings. In the course of its opinion the court said:

"Rule 52 (a) of the Rules of Civil Procedure, 28 U.S.C.A. following Section 723 c was intended to accord with the decision on the scope of the review in federal equity practice; . . ."

In the case of *Katz Underwear Co. v. United States*, (1942) 127 F. 2d 965, 966 (C.C.A. 3), the court said:

"In a case tried without a jury Civil Procedure Rule 52(a), 28 U.S.C.A. following Section 723 c,



governs. . . . This rule permits review to the extent formerly allowed in federal equity practice. 3 Moore's Federal Practice, Section 52.01, p. 3118. In equity if it clearly appeared that the court misapprehended the evidence its findings of fact may be set aside."

**The term "established line" means the passage of public conveyances to and fro between distant points with regularity over a route established by governmental authority.**

The ultimate question in this case is whether or not the Appellants, during the period October 1, 1941 to September 30, 1944, were operating their said limousines "on an established line" within the meaning of Sec. 3469, *I.R.C.* This is a mixed question of law and fact. Neither the statute nor the reports of the Congressional Committees have attempted to define the meaning of the term "on an established line".

When a Revenue Act does not define a term it contains, it becomes necessary to resort to the ordinary meaning of the words used in ascertaining the significance of the term in question.

In *Trenton Cotton Oil Company v. Comm.*, (1945) 147 F. 2d 33, 36 (CCA 6th), the court said:

"The statute does not define the term 'stock or securities' and it is therefore necessary to resort in interpreting the provision to the common and ordinary meaning of these words."

Let us first consider the word "Line". In *Webster's Encyclopedic Dictionary* (1940) that word is said to mean—

"A series of public conveyances, as buses, steamships, airplanes, & c., passing between places with regularity."

The above meaning was judicially approved in the case of *Bruce Transfer Company v. Johnson*, (1939) 227 Iowa 50, 53; 287 N.W. 278, 280.

"What was the meaning of the word 'line' as so used at the time in question? Century Dictionary—1889—Line: 'A series of public conveyances, as coaches, steamers, packets and the like, passing to and fro between places with regularity.' . . . 'Stageline', 'railroad line' and 'automobile line' are expressions which are ordinarily understood to mean a regular line of vehicles for public use operated between distant points, or between different cities."

From these definitions we learn that a "line" means the passage of public conveyances to and fro between distant points with *regularity*, but we are dealing with more than merely a "line". Our immediate concern is with "an established line". Lexicographers state that the word "established" means to make stable, to settle on a firm or permanent basis.

A state statute using the words "established route" was construed in *Public Utilities Commission v. Pulos*, (1930) 75 Utah 527, 538; 286 Pac. 947, 952. The court relied on the general definition by lexicographers, but held a route could not be established by acts of private persons. In the course of its opinion, the court said:

"It would seem reasonably clear that an established route must be a route that has a legal existence . . . It cannot well be said that a route along a public highway can be established by acts which are prohibited by law, nor by the acts of private persons or corporations."

From this it becomes apparent that there must not only be a "line"—a passage to and fro with *regularity*, but the "line" must be "established" in order to come within the provisions of the Revenue Code now under consideration. We have seen too that to be an "established line" the line must be established by some authority beyond that of private persons and corporations.

This is the common meaning of the term "established line" when used to indicate an established line of motor vehicles. In 1941, when this Revenue Act was passed, lines of motor vehicles were commonly established only by public authority. When Congress used the words "operated on an established line" it was referring solely to an established line of motor vehicles, consequently the only meaning that can be fairly ascribed to the said language selected by Congress is a line of motor vehicles established by proper public authority. There is nothing to indicate that Congress used the term with any other meaning in mind.

**Appellants were not operating their limousine service on an "established line" within the meaning of Sec. 3469, I R C.**

The statutes of the State of Washington, in force during the period with which we are concerned, regulat-

ing passenger transportation by motor vehicles, contained the following provisions:

“The term ‘commission’ when used in this act means the public service commission of the State of Washington, or the director of public works or such other board or body as may succeed to the powers and duties now held by the public service commission.” (Sec. 6387 (c), *Remington’s Revised Statutes of Washington*).

and

“No auto transportation company shall hereafter operate for the transportation of persons and, or, property for compensation between fixed termini or over a regular route in this state, without first having obtained from the commission under the provisions of this act a certificate declaring that public convenience and necessity require such operation; . . .” (Sec. 6390, *Remington’s Revised Statutes of Washington*).

The Appellants were not operating their vehicles or their limousines “on an established line” as that term is used in Sec. 3469, *I. R. C.*

Mr. Wenck, as a witness in behalf of the Appellants, testified as follows:

“Q. Now, has any public authority, the town, the City or the State of Washington specified a route for your company?           A. No.

Q. Do you hold from the State of Washington—I believe you call it in this state your Department of Public Works—maybe they’ve changed it to the Department of Public Service—one or the other, or both, do you hold any certificates of convenience or necessity from such department?



A. Not during that period.

Q. Well, have you ever held one for that particular run from town to the Boeing Field?

A. No.

Q. At no time?                      A. No."                      (Tr. 94, 95)

Finding XVI (Tr. 31) shows that Appellants' limousines were licensed as "for hire" vehicles under the laws of the State of Washington and were operated as "for hire" vehicles in the City of Seattle.

The City of Seattle maintains a city street bus line running from its metropolitan area to the Boeing Airport under the management of the Seattle Transit Commission, a Commission consisting of three people appointed by the Mayor of said City, and this city street bus line operates on an established time schedule over the city streets on a fixed route (Finding XV, Tr. 30-31). The public could rely on the regularity of this city bus line, but as we shall see from the facts hereinafter set forth the members of the general public wishing to travel between the downtown district of Seattle and Boeing Airport could not rely on the limousine service provided by the Appellants. In the first place, the service was only available to persons who had purchased air line tickets or to air line employees. In the second place, there was no assurance that a trip would even be made as weather or other conditions might cause the air line companies to order the limousines to proceed to an emergency air port, or to postpone or even to cancel a trip. Such uncertainty of operation is totally incompatible with the idea of an established line of transporta-



tion. Actually, the limousine service is subject to the call of the air line companies.

**Regulation 42, Sec. 130.58 is an interpretive regulation, does not have the force of law, and cannot minimize the meaning of Sec. 3469 I R C.**

Although the Commissioner has not attempted to define "an established line", he did promulgate *Regulation 42, Sec. 130.58*, in which he states his interpretation of what the term "operated on an established line" means, what it does not necessarily mean, and what it implies. The regulation provides:

"The term 'operated on an established line' means operated with some degree of regularity between definite points. It does not necessarily mean that strict regularity of schedule is maintained; that the full run is always made; that a particular route is followed; or that intermediate stops are restricted. The term implies that the person rendering the service maintains and exercises control over the direction, route, time, number of passengers carried, etc. It implies also that the primary contract between the operator and the person served is for the transportation of the person and not for the hire or use of the vehicle."

Inasmuch as the negative statement in the above Regulation employing the term, "regularity of schedule" immediately follows the positive statement employing the phrase, "operated with some degree of regularity between definite points", it is reasonable to suppose that the positive statement likewise refers to "regularity of schedule". Thus, in defining the term, "operated on an

established line", the regulation requires definite points, and a schedule is presupposed.

Let us look again at the negative sentence commencing with the words, "It does not necessarily mean . . . ". To give logic and meaning to this sentence a regular established schedule between points must be presupposed; otherwise, the words "schedule", "full run", "particular route" and "intermediate stops" would be without significance. Where such a schedule between definite points has in fact been established and is in operation, then in the Commissioner's interpretation of the law one or more of the conditions set forth in the sentence under analysis would not necessarily mean that the vehicles in question were not being operated "on an established line".

As we have seen, the word "line" connotes regularity. To operate on a line would obviously mean to operate with regularity. That is the meaning of the language Congress used, but in the Regulation under discussion the Commissioner has attempted to whittle away this requirement. This he does not have the power to do.

In the case of *Morrill v. Jones*, (1882) 106 U.S. 466, 467; 1 S. Ct. 423, the Supreme Court in considering a regulation made by the Secretary of the Treasury with respect to a statute dealing with import duties said:

"The Secretary of the Treasury cannot by his regulations alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted."

In *Allis v. LaBudde*, (1942) 128 F. 2d 838, 840, (C.C.A. 7), the Commissioner by regulation approved by the Secretary of the Treasury attempted to limit the scope of a provision of the Internal Revenue Code. The court said:

“ . . . Although the Commissioner with the approval of the Secretary, is authorized to prescribe all needful regulations for the enforcement of Revenue Acts, it needs no argument that he cannot by such regulations, alter or amend an Act, or limit rights granted by it.”

If Congress had intended to qualify the meaning of the word “line”, it could easily have done so, and when it did not, we are compelled to act on the assumption that Congress used it with its ordinary meaning. And, if Congress had intended an interpretation of the term “on an established line” different from that ordinarily understood, that body could have easily expressed its intention in apt language.

**Regardless of the correctness of Regulation 42, Sec. 130.58, the Appellants were not operating their limousines on an established line under the test set up in this Regulation.**

Whether or not the Regulation correctly explains the meaning of an “operation” on an established line, the Appellants, by the very tests set up in the Regulation, were not operating their limousines “on an established line”. As we observed the *Regulation* states:

"The term 'operated on an established line' means operated with some degree of regularity between definite points."

In the case at bar the times of departure of the limousines were governed by the air lines and by weather conditions (Tr. 74, 75, 78, 92, 93, 97, 101, 116, 120). Whether or not a trip went from the down town area of Seattle to Boeing Field or to an emergency airport depended upon weather conditions, or whether Boeing Field was available for civilian use (Finding XIII, Tr. 29, 124). Running under such uncertain and fluctuating conditions could not be considered as an operation even with that "degree of regularity" contemplated by the Regulation, and most certainly would not be an operation with the regularity implied by the word "line" written into the statute by Congress.

There were no definite places in the downtown district of Seattle where passengers were discharged. The limousines would take a passenger to any place in the downtown district where he wanted to get out (Tr. 61, 62, 109, 118, 128). The places where passengers were "picked up" were not designated by the Appellants but by the air line companies to suit the convenience of their air passengers (Tr. 63, 64, 69, 70, 96, 97, 99). Under these circumstances the operation of the Appellants could not be regarded as having been between "definite points" within the meaning of the quoted portion of the Regulation.

The Regulation also provides:

"The term (operation on an established line)



implies that the person rendering the service maintains and exercises control over the direction, route, time, number of passengers carried, etc.”

The Appellants provided the transportation service, but the air lines controlled the direction, the route, the time of departure and the number of passengers to be carried (Tr. 59, 73, 74, 75, 78, 92, 95, 97, 99, 111, 116, 117, 120, 123). They controlled the direction of the route because they specified to which air field trips would be made from the downtown district, and if there were incoming passengers they specified the air field from which the passengers would be transported to the downtown district. The time of the limousine trips was controlled entirely by the air line companies, and depended upon the times of the scheduled take-offs and landings of the planes, and delays such as caused by adverse weather (Tr. 65, 73, 74, 75, 93, 97, 99, 111, 116, 117). The air line companies controlled the number of persons because the service was limited to passengers with air line tickets and employees of air lines (Tr. 65, 95, 122). Thus tested, the Appellants did not have the control which the Regulation says is implied in the term “operated on an established line”. In other words, tested by the Regulation the Appellants did not have the control necessary to constitute an “operation on an established line”.

The same Regulation also says that the term “operated on an established line” implies:

“that the primary contract between the operator and the person served is for the transportation of



the person and not for the hire or use of the vehicle."

The trial court found as a fact (Finding VII, Tr. 26) that Appellants were to provide "transportation service", which, of course, agrees with the parties agreed facts (No. 7, Tr. 9) that "limousine service" was to be provided. The facts which are not disputed and which show that Appellants did not have the requisite control will likewise prove conclusively, that Appellants provided only cars and drivers at the request of the airlines.

Appellants did not establish any points between which to operate (Tr. 92, 96, 97, 109, 117, 118, 120, 124, 128). They did not prepare or publish any schedule under which to operate (Tr. 103). The facts show that they did not maintain any control over the external factors normally present in the transportation of persons. They simply furnished cars and drivers and followed the orders given by the air lines, which most certainly is not the operation of "an established line" of motor vehicles contemplated by the statute.

**The Findings of Fact are clearly erroneous in that they omit material, uncontroverted facts clearly showing Appellants were not "operating" their limousines "on an established line".**

**Appellants are not subject to transportation taxes on account of the limousine service furnished by them to the air lines.**

In this case we are confronted with an unusual situation. The trial court may have gone into more detail in its Findings than is contemplated by *Rule 52* of the *Federal Rules of Civil Procedure*, but once having undertaken the task of making detailed and specific findings of the facts upon which it would base its conclusion as to whether or not Appellants were operating their limousines "on an established line", it is submitted that it became the court's duty to make findings upon *all* such facts rather than only upon some of them. This the court did not do. It went into minute detail concerning vehicles not involved in this action (Finding VIII, Tr. 26), the color of paint and detachable and permanent signs on the vehicles (Finding IX, Tr. 27), but failed to make findings upon the more important and uncontroverted facts hereinbefore detailed in Specification of Error II that have a direct bearing upon whether or not the Appellants' limousines were being operated "on an established line".

The trial court said that its Conclusions of Law were based upon the facts it found (Tr. 33). Its first conclusion is that the Appellants were operating their limousines "on an established line" within the meaning of *Sec. 3469, I R C* (Tr. 33, 34). From this it conclusively appears that the Conclusion (whether regarded as an ultimate fact or as a conclusion of law) is based on only a selected portion of the material facts that bear upon the principal question in this case.

The Appellants are aware that *Rule 52 (a), F R C P*, provides:

“Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.”

In this case we have a situation wherein the findings are clearly erroneous. Not erroneous in the sense that the facts are not accurate but in the equally vital sense that they are unfair and prejudicial because of the said omissions.

If Conclusion of Law I (Tr. 33, 34) should be regarded as an ultimate fact rather than a conclusion of law, it would still be clearly erroneous because it is contrary to the evidence in this case. When the uncontroverted facts summarized in Specification II, and elsewhere referred to in this brief are added to the facts found by the court, it becomes readily apparent that the Appellants, in providing limousine service to the air lines, were not “operating” motor vehicles “on an established line” within the meaning of Sec. 3469, *I R C*. Their limousine service came clearly within the statutory exception, consequently they were and are not liable for the purported transportation taxes, penalties and interest assessed against them.

**Conclusions of Law I, II and III, not being supported by the evidence and being contrary to the evidence and the law, are clearly erroneous.**

## CONCLUSION

From the foregoing analysis of the law and the evidence, it is apparent that all of the Conclusions of Law made by the trial court, and the trial court's decision and judgment dismissing the Appellants' complaint with prejudice are clearly erroneous and that the judgment of the trial court should be reversed.

Respectfully submitted,

R. T. JACOB,

RANDALL S. JONES,

917 Public Service Building,

Portland 4, Oregon,

Attorneys for Appellants.

No. 11736

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IN THE  
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**Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

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E. ROYCE, B. ROYCE and A. H. WENCK,  
doing business as GRAY LINE TOURS,  
*Appellants*  
vs.

CLARK SQUIRE, Collector of Internal Revenue  
for the District of Washington,  
*Appellee*

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UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED  
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SOUTHERN DIVISION

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**BRIEF FOR APPELLEE**

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*Assistant Attorney General.*

SEWALL KEY,  
A. F. PRESCOTT,  
MAURICE P. WOLK,  
*Special Assistants to the  
Attorney General.*

J. CHARLES DENNIS,  
*United States Attorney.*

HARRY SAGER,  
*Assistant United States Attorney.*

OFFICE AND POST OFFICE ADDRESS:  
324 FEDERAL BUILDING  
TACOMA 2, WASHINGTON

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**BRIEF FOR APPELLEE**

---

OPINION BELOW

The oral opinion of the District Court (R. 145-153) is unreported. Its findings of fact and conclusions of law (R. 23-34) are reported in 73 F. Supp. 510.

**JURISDICTION**

This action was brought to recover transporta-

tion taxes assessed and collected under Section 3469 of the Internal Revenue Code for the period October, 1941, through September, 1944. A claim for refund was filed within four years from the time of payment, as provided by Section 3313 of the Internal Revenue Code, and was rejected by the Commissioner of Internal Revenue on June 19, 1945. (R. 25.)

This suit was commenced on April 2, 1946 (R. 2-4), within the time allowed by Section 3772 (a) (2) of the Internal Revenue Code. The jurisdiction of the District Court was invoked under the provisions of Section 24, Fifth, of the Judicial Code, as amended. Judgment of the District Court was entered on June 16, 1947 (R. 22, 38-39), and notice of appeal was filed on August 22, 1947. (R. 40-41.) This Court has jurisdiction of the matter pursuant to Section 128 (a) of the Judicial Code, as amended.

## QUESTIONS PRESENTED

1. Whether Section 130.58 of Treasury Regulations 42 properly construes Section 3469 of the Internal Revenue Code.

2. Whether taxpayers' motor cars were operated on an established line within the meaning of Section 3469.

3. Whether the taxpayers were prejudiced by the trial court's ruling on the admission of evidence.

4. Whether the additional findings of fact requested by taxpayers are necessary or proper.

## STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations involved may be found in the Appendix, *infra*.

## STATEMENT

The taxpayers are engaged in the business of transporting passengers by motor vehicle under the name and style of Gray Line Tours, with their principal place of business in Seattle, Washington. (R. 24.) In May, 1941, they entered into an agreement with United Airlines under which they agreed to provide transportation by limousine for United's passengers to and from Boeing Field Airport in Seattle. Similar arrangements were subsequently made by taxpayers with Northwest Airlines and Pan-American World Airways. (R. 26.)

The transportation services were performed by taxpayers with a fleet of seven-passenger limousines, which were for the most part painted in a uniform color and identified by printed rectangular signs bear-



ing the designation "Air Line Service", "Gray Line Tours". During most of the time, the vehicles were further identified by painted detachable emblems of the airline companies, the emblem used at a particular time depending on which airline's passengers were being transported. (R. 26-27.)

Limousine service for airline patrons was provided in the following manner:

When passengers purchased their tickets for a scheduled flight, they were asked by an airline employee if they desired limousine service to the airport. If passengers requested such service, they were informed of the places at which they could board the limousines, which were usually the airlines' own office or designated hotels. They were also advised of the time when the limousines would depart from those places, the departure time being approximately one hour prior to flight time. Thereafter, the airlines would notify Gray Line when the flight was departing and would furnish it with the names of the passengers who were to be transported and the places at which they were to be picked up. (R. 27-28.) Like arrangements were made for incoming passengers; prior to arrival of an incoming flight, the airline would advise Gray Line of the arrival time and the latter would then send a limousine to transport pass-

engers desiring service to downtown Seattle. (R. 28.) Approximately fifty per cent of airline passengers used limousines in travelling to or from the airport. (R. 29.)

Patrons desiring transportation to the airport were picked up only at designated points in the downtown area and pursuant to a telephone call from the airlines to the taxpayers. The limousine drivers were instructed by taxpayers to follow the most direct route to the airport, and in practice usually travelled over one of two routes except in cases where road repairs or traffic congestion compelled them to travel on other streets. (R. 28-29.)

The airlines did not sell or issue tickets that were good for transportation in the limousines. (R. 27.) Instead, the fares were paid by the passengers directly to the limousine drivers. Prior to October 1, 1941, the one-way fare to or from Boeing Field was seventy-five cents a passenger. When Section 3469 of the Internal Revenue Code, imposing a five per cent tax on transportation became effective on that date, taxpayers increased the one-way fare to eighty cents a person. Subsequent increases in the transportation tax rates by amendments to the revenue laws were attended by simultaneous fare increases by taxpayers to cover the added tax. When a passenger asked what

the fare included, the driver stated that it included the tax. (R. 31-32.)

Where limousine passengers were carried at the expense of an airline the latter paid taxpayer an agreed amount per passenger plus an additional amount separately billed as a tax, the added amount being the transportation tax then in effect. (R. 32.)

The limousine met all incoming flights (R. 30) and approximately ninety-nine per cent of the outgoing flights. (R. 124.)<sup>1</sup> From ten to fifteen per cent of the flights were postponed due to weather conditions. (R. 29.)

The case was presented to the court below for the determination of two issues which were defined by the pre-trial order. (R. 7-21.) The first was whether or not the taxpayers, in transporting passengers to or from the airport, were operating their vehicles on an established line within the meaning of Section 3469 of the Internal Revenue Code. The second issue was whether the taxpayers had paid the amounts in suit from their own funds or had otherwise established the right to sue for their refund. (R. 15-16.)

---

<sup>1</sup> While the trial court made no finding to that effect, the uncontradicted testimony of taxpayers' witness was that the limousines met all but one per cent of scheduled outgoing flights. (R. 123-124.)

The trial court found against the taxpayers on the first issue, holding that their limousines were operated on an established line within the meaning of the statute. In so holding, the court rejected the taxpayers' contention that Section 130.58 of Treasury Regulations 42 was invalid as contrary to the intent and purpose of the statute. While expressing the view that it would also be inclined to hold against taxpayers on the second issue were it necessary to pass on it, the court reserved decision on that issue. (R. 145-153.) Finding as it did that the limousines were operated on an established line, the court concluded that the taxes in suit had been properly collected and dismissed the complaint. (R. 33-34.)

## SUMMARY OF ARGUMENT

I. As used in the statutes taxing the transportation of persons by motor vehicles, an established line has been consistently construed by the applicable regulations to mean a regularity of operations of motor vehicles between definite points. During the period that this statutory term has appeared in the revenue laws, Congress has on several occasions reenacted or amended the transportation tax laws without disturbing this definition, and has thereby expressed its approval of the regulations and given them the force of law.



II. The question of whether taxpayers' limousines were in fact operated on an established line was fully litigated below and determined adversely to the taxpayers. This determination was supported by substantial evidence and should not be disturbed on appeal.

III. When a ruling on the admissibility of evidence is challenged on appeal, the person asserting the error must show not only that error has been committed but also that it was prejudicial to him. Taxpayers have been unable to show that they were prejudiced by the trial court's action in admitting the challenged evidence and it is therefore unnecessary for this Court to consider whether the evidence was properly admitted.

IV. The trial court's findings of fact should consist only of a concise statement of the essential facts rather than a detailed summarization of the evidence from which those facts are determined. The additional findings of fact requested by the taxpayers amounted to little more than a recapitulation of evidence, and were properly excluded from the findings made by the court.



## ARGUMENT

## I

THE DISTRICT COURT PROPERLY DETERMINED THAT TAXPAYERS' VEHICLES WERE OPERATED ON AN ESTABLISHED LINE

A. *The Regulations correctly define the term "operated on an established line"*

Section 3469 of the Internal Revenue Code (Appendix, *infra*) levies a tax upon amounts paid within the United States for the transportation of persons by rail, motor vehicle, water, or air. However, as applied to transportation in motor vehicles having a seating capacity of less than ten adult persons, the tax is applicable only if the vehicles are operated on an established line. It is with the latter limitation that we are concerned since all of the transportation services involved here were performed with seven-passenger motor cars operated by the taxpayers.

The statute itself does not define the terms "established line" or "operated on an established line". However, by Section 130.58 of Treasury Regulations 42 (Appendix, *infra*), the Commissioner of Internal Revenue has undertaken to supply a definition. That section provides in part as follows:

The term "operated on an established line" means operated with some degree of regularity between definite points. It does not necessarily mean that strict regularity of schedule is maintained; that

the full run is always made; that a particular route is followed; or that intermediate stops are restricted. The term implies that the person rendering the service maintains and exercises control over the direction, route, time, number of passengers carried, etc. It implies also that the primary contract between the operator and the person served is for the transportation of the person and not for the hire or use of the vehicle.

The principal question here is whether this provision of the Regulations properly construes Section 3469 of the Internal Revenue Code, as held by the court below, or whether the Regulations are contrary to the intent and meaning of the statute, as contended by the taxpayers.

The taxpayers have challenged the validity of Section 130.58 of Regulations 42, on several grounds. They contend *inter alia* that the word "established" as used in the statute necessarily connotes creation or approval by a governmental authority and that therefore the phrase "operation on an established line" must mean operation over a route fixed by a regulatory government agency. (Br. 16-17.) They further contend that the Regulations have improperly limited the requirement of regularity of operation by providing that strict regularity of schedule need not be maintained, nor a fixed route followed or intermediate stops restricted. (Br. 20-21.)

We think that several answers may be made to

these contentions. For example, it should be noted that as used by the Commissioner in the applicable Regulations, the word "established" means permanent, recurring, or regular as opposed to sporadic or casual. This is a commonly accepted meaning of the term, and has been applied in various connections. *Wells Lamont Corp. v. Bowles*, 149 F. (2d) 364 (Em. App.); *U. C. C. v. Collins*, 182 Va. 426, 29 S.E. (2d) 388. Therefore, even if it be assumed that the interpretation contended for by the taxpayers is a permissible one, it must yield to that adopted by the Commissioner, for the law is well established that where there is doubt as to the construction of a statute, the contemporaneous interpretation of the law by the department charged with its enforcement is generally held to be controlling where not arbitrary or unreasonable. *Brewster v. Gage*, 280 U.S. 327; *Maryland Casualty Co. v. United States*, 251 U.S. 342; *R. J. Reynolds Tobacco Co. v. Commissioner*, 97 F. (2d) 302 (C.C. A. 4th), affirmed, 306 U.S. 110.

However, the short answer to the many charges leveled by taxpayers against the Regulations may be found in the fact that the Commissioner's interpretation of the term "operated on an established line" has continued without material change since that language first appeared in the transportation tax laws, and

must now be deemed to have received Congressional approval and to have the force and effect of law. *Crane v. Commissioner*, 331 U.S. 1; *Helvering v. Winmill*, 305 U.S. 79.

The tax on transportation of persons by motor vehicles first appeared in the Revenue Act of 1917, c. 63, 40 Stat. 300. Section 500 of that Act provided in material part as follows:

Sec. 500. That from and after the first day of November, nineteen hundred and seventeen, there shall be levied, assessed, collected, and paid \* \* \* (c) a tax equivalent to eight per centum of the amount paid for the transportation of persons \* \* \* by any form of mechanical motor power on a regular established line when in competition with carriers by rail or water \* \* \*.

The Act did not define the term "regular established line" and so far as we have been able to determine, no administrative interpretations of that language were issued under the 1917 statute. The transportation tax was reenacted in substantially identical terms in Section 500 of the Revenue Act of 1918, c. 18, 40 Stat. 1057. Following passage of the 1918 statute, the Commissioner promulgated Treasury Regulations 49 (1919 ed.) relating to the collection of tax on transportation and other facilities. So far as relevant here, these Regulations provided as follows:



Art. 39. *Regular established line.* — The phrase “a regular established line” as used in Section 500, subdivision (c), is held to mean a regularity of operation of transportation facilities by motor power between definite points. If such motor transportation is furnished with regularity between points which are connected by rail or water routes, it is not necessary that the automobile or motor transportation pursue a specified route of travel. The regularity of operation of the motor transportation is the essential element of “a regular established line.”

The tax on transportation was repealed on January 1, 1922, by Section 1400 of the Revenue Act of 1921, c. 136, 42 Stat. 227. In the meantime, however, the regulatory provisions quoted above were presumably accepted as a correct interpretation of the law and applied by the Commissioner in administering the statute.

Following repeal of the transportation tax in 1922, no further attempt was made to tax the carriage of persons by motor vehicles until Section 3469 was added to the Internal Revenue Code in 1941. While that statute was of broader application than its predecessors and differed somewhat in terms from them, it retained the language of the earlier Acts relating to operations of motor vehicles on an “established line”. Accordingly, when Treasury Regulations 42 were promulgated in 1942, the Commissioner adopted without material change the definition of



“established line” that was embodied in the earlier Regulations. In so doing, the Commissioner followed the only course open to him since the legislative approval of the former Regulations, by reenactment of the statutory provision to which they relate, clearly gave such Regulations the force of law and expressly negated the authority of the Commissioner to repeal the earlier interpretation. *Helvering v. Reynolds Co.*, 306 U.S. 110. Moreover, since 1941, Section 3469 of the Internal Revenue Code has twice been amended as to rates<sup>2</sup> but Congress has not seen fit to disturb the Commissioner’s Regulations.

Thus the regulatory provisions have remained substantially unchanged since 1918, and during that period, Congress repeatedly has reenacted the provision of the revenue laws on which they are based. This action was taken with knowledge of the construction placed upon the statute by the Commissioner. If Congress had considered this interpretation erroneous, it would have amended the law. Its failure to do so requires the conclusion that the interpretation was not inconsistent with the intent of the statute (*Mass. Mutual Life Ins. Co. v. United States*, 288 U.S. 269) and gives to the Regulations the effect of law (*Crane*

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<sup>2</sup> Section 609 of the Revenue Act of 1942, c. 619, 56 Stat. 798, and Section 302 (a) of the Revenue Act of 1943, c. 63, 58 Stat. 21.

*v. Commissioner, supra; Helvering v. Reynolds, supra).*

B. *The evidence supports the District Court's determination that taxpayers' vehicles were operated on an established line.*

Assuming the validity of the Regulations, the evidence supports the determination of the District Court that the taxpayers' vehicles were operated on an established line.<sup>3</sup> The testimony showed that the limousines were operated with reasonable regularity conforming with the scheduled operations of the three airlines with whom taxpayers had working agreements. (R. 73, 97, 99, 100, 119, 121.) All operations were between definite points, Boeing Field Airport on the one hand, and the downtown area of Seattle on the other hand. (R. 109, 111, 118, 128, 130.) Outgoing passengers were picked up only at a limited number of places and carried directly to the airport (R. 62, 64, 71, 81, 110, 116-117) while incoming passengers were transported from Boeing Field to the downtown area, with discharge privileges at interme-

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<sup>3</sup> While the trial court treated this as a conclusion of law, it appears to be more properly a finding of fact. If so, its effect as a finding is not changed by the erroneous designation. *Alexander v. Johnston*, 137 F. (2d) 712 (C.C.A. 9th); *Smith v. Fletcher*, 152 F. (2d) 20 (App. D.C.); *Lewis v. Ingram*, 57 F. (2d) 463 (C.C.A. 10th), certiorari denied, 287 U.S. 614.

diate points, as permitted by the Regulations (R. 70, 128). While the limousines were not dispatched on a trip without first receiving advice from the airlines of the arrival or departure of scheduled flights, the evidence conclusively established that the only person authorized to dispatch the limousines were taxpayers' own employees (R. 92, 116, 118, 129) and that in travelling between the airport and the downtown area the vehicles travelled over routes of their own choosing (R. 59, 61, 85, 93, 96). Finally, it is undisputed that the primary contract between taxpayers and the passengers was for the transportation of the passengers and not for hire or use of the vehicle. (R. 9.)

Hence it appears that in the conduct of their business, taxpayers operated their motor vehicles with regularity between definite points, maintaining and exercising control over such matters as the direction and route adopted, schedules, and number of passengers carried. They were, therefore, engaged in the operation of an established line within the meaning of the applicable statute and Regulations.

## II

### THE DISTRICT COURT DID NOT COMMIT REVERSIBLE ERROR BY ADMITTING EXHIBIT A-1 INTO EVIDENCE

In the course of the trial, the court admitted into

evidence over taxpayers' objections an exhibit offered on behalf of the Collector. (R. 62-63.) The exhibit to which this objection was directed consisted of a communication written by one employee of United Airlines to another employee or officer of the same concern, describing the routes and schedules followed by the airport limousines when conveying passengers between Boeing Field and downtown Seattle. It is contended that since this communication was not addressed to the taxpayers, it was simply hearsay and, therefore, not properly admissible. However, it is not necessary to consider whether the letter should have been admitted in evidence for the rule is that where the admissibility of evidence is challenged on appeal, the burden is on him who alleges the error to show not only that it existed but further that it was prejudicial to him. *United States v. Crescent Amusement Co.*, 323 U.S. 173; *Drybrough v. Ware*, 111 F. (2d) 548 (C.C.A. 6th); *Marin v. Ellis*, 15 F. (2d) 321 (C.C.A. 8th). There has been no showing here that the taxpayers were prejudiced by admission of the letter, and it is unlikely that such a showing can be made since the matters covered by the letter were also established by other evidence in the case. Several witnesses testified to the routes followed by the limousines (R. 60-61, 85, 88) and to the pick-up and discharge points (R. 61-62, 71, 81-82), which were



dealt with in the first two paragraphs of the letter, while the pre-trial order covered the subject matter of the third and concluding paragraph of the letter (R. 8). Thus even assuming error in the introduction of the exhibit, the facts with which it purported to deal were fully established by other competent evidence and consequently the error, if any, in permitting the letter to be introduced, was not prejudicial.

### III

## ADDITIONAL FINDINGS OF FACT WERE NOT NECESSARY

Error is also assigned to the failure of the court below to make certain additional findings of fact. (Br. 8-10.) The requested findings, sixteen in number, are for the most part simply a laborious recapitulation of the evidence and have no place in the trial court's findings. Findings of fact should not be discursive; they should not state the evidence or any of the reasoning upon the evidence, but should contain only a statement of the ultimate facts found by the courts. *Petterson Lighterage & T. Corp. v. New York Central R. Co.*, 126 F. (2d) 992 (C.C.A. 2d); *Brown Paper Mill Co. v. Irvin*, 134 F. (2d) 337 (C.C.A. 8th); *United States v. Forness*, 125 F. (2d) 928 (C.C.A. 2d), certiorari denied, 316 U.S. 694. Since the pres-



ent findings of fact and conclusions of law, together with the opinion, furnish a clear understanding of the basis of the District Court's decision, no purpose would be served by incorporating into the findings the elaborate and particularized itemization of evidence which taxpayers now request. Cf. *Rossiter v. Vogel*, 148 F. (2d) 292 (C.C.A. 2d); *Tulsa City Lines v. Mains*, 107 F. (2d) 377 (C.C.A. 10th).

While not directly germane to the issues involved in this appeal, it is not inapposite to note that in no event could the taxpayers prevail in this action since it is apparent from the court's opinion and its findings that the taxes in suit were paid by passengers of the limousines and not borne by the taxpayers. Since there has been no showing that these amounts have been repaid to the persons who paid them or that the consent of such persons has been obtained to the allowance of the refund sought here, taxpayers are barred from recovery by Section 3471 of the Internal Revenue Code (Appendix, *infra*).

## CONCLUSION

The judgment of the District Court is correct and should be affirmed.

Respectfully submitted,

THERON LAMAR CAUDLE,  
*Assistant Attorney General.*

SEWALL KEY,  
A. F. PRESCOTT,  
MAURICE P. WOLK,  
*Special Assistants to the  
Attorney General.*

J. CHARLES DENNIS,  
*United States Attorney.*

HARRY SAGER,  
*Assistant United States Attorney.*

January, 1948.

## APPENDIX

*Internal Revenue Code:*

SEC. 3469<sup>3</sup> [as added by Section 554 of the Revenue Act of 1941, c. 412, 55 Stat 687]. TAX ON TRANSPORTATION OF PERSONS, ETC.

(a) *Transportation.* There shall be imposed upon the amount paid within the United States, on or after October 10, 1941, for the transportation, on or after such effective date, of persons by rail, motor vehicle, water, or air, within or without the United States, a tax equal to 5 per centum of the amount so paid. \* \* \* Such tax shall apply to transportation by motor vehicles having a passenger seating capacity of less than ten adult passengers, including the driver, only when such vehicle is operated on an established line.

\* \* \*

(26 U. S. C. 1940 ed., Sec. 3469.)

## SEC. 3471. REFUNDS AND CREDITS.

(a) Credit or refund of any overpayment of tax imposed by Subchapter B, Subchapter C, or Subchapter E may be allowed to the person who collected the tax and paid it to the United States if such person establishes, to the satisfaction of the Commissioner, under such regulations as the Commissioner with the approval of the Secretary may prescribe, that he has repaid the amount of such tax to the person from whom he

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<sup>3</sup> During the period involved, this statute has remained substantially the same except as amended as to rates by Section 609 of the Revenue Act of 1942, c. 619, 56 Stat. 798, and Section 302 (a) of the Revenue Act of 1943, c. 63, 58 Stat. 21.

collected it, or obtained the consent of such person to the allowance of such credit or refund.

\* \* \*

(26 U. S. C. 1940 ed., Sec. 3471.)

*Treasury Regulations 42 (1942 ed.):*

SEC. 130.58. *Motor Vehicles with Seating Capacity of Less Than 10.*—No tax is imposed on transportation by a motor vehicle having a seating capacity of less than 10 adult passengers, including driver, unless such vehicle is operated on an established line. The term “operated on an established line” means operated with some degree of regularity between definite points. It does not necessarily mean that strict regularity of schedule is maintained; that the full run is always made; that a particular route is followed; or that intermediate stops are restricted. The term implies that the person rendering the service maintains and exercises control over the direction, route, time, number of passengers carried, etc. It implies also that the primary contract between the operator and the person served is for the transportation of the person and not for the hire or use of the vehicle.

**In the United States**  
**CIRCUIT COURT OF APPEALS**  
**for the Ninth Circuit**

---

E. ROYCE, B. ROYCE and A. H. WENCK, doing  
business as Gray Line Tours,

*Appellants,*

vs.

CLARK SQUIRE, Collector of Internal Revenue  
for the District of Washington.

*Appellee.*

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**APPELLANTS' REPLY BRIEF**

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Upon Appeal from the District Court of the United  
States for the Western District of  
Washington Southern Division.

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R. T. JACOB,  
RANDALL S. JONES,  
917 Public Service Building,  
Portland 4, Oregon,  
*Attorneys for Appellants.*





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**In the United States**  
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Upon Appeal from the District Court of the United  
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Washington Southern Division.

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The letter B as herein used refers to the brief of the  
Appellee.

**REPLY TO APPELLEE'S ARGUMENT HEADED:**  
**"A. THE REGULATIONS CORRECTLY DEFINE**  
**THE TERM 'OPERATED ON AN**  
**ESTABLISHED LINE'." (B. 9)**

Boiled down to its essential essence the Appellee's  
argument on this point is that the Commissioner's in-

terpretation of the term "operated on an established line" as set forth in Regulation 42, Section 130.58 is correct because within approximately eighteen months after the Regulation was promulgated Section 3469, I.R.C. was twice amended as to rates. These amendments did not reenact the wording of Section 3469. They merely provided that "5 per centum" and then "10 per centum" be changed to "10 per centum" and "15 per centum" respectively. Section 609, Revenue Act of 1942, and Sec. 302, Revenue Act of 1943.

In view of differences in the facts, the cases of *Helvering v. Winmill*, 305 U.S. 79; *Helvering v. Reynolds Co.*, 306 U.S. 110; *Crane v. Commissioner*, 331 U.S. 1, and *Mass. Mutual Life Ins. Co. v. United States*, 288 U.S. 269, obviously do not support the points for which they are cited by the Appellee. While in the *Crane* case, *Supra*, the Supreme Court held that the Regulation under discussion had the force of law, the true rule with respect to the force and effect of Regulations is stated in the case of *Morrill v. Jones*, 106 U.S. 466, and *Allis v. LaBudde*, 128 F. 2d 838, cited by the Appellants on page 21 and 22 of their brief, and in the case of *F. W. Woolworth Co. v. U.S.*, (1937) 91 F. 2d 973, 976.

The so called doctrine of legislative acquiescence cannot in and of itself result in a conclusive interpretation of a statute. It cannot bind a court. In the recent case of *Jones v. Liberty Glass Company*, (1947) 92 L. Ed. 195, 200, 68 S. Ct. 229, 234, the Supreme Court of the United States said:

“ . . . But the doctrine of legislative acquiescence is at best only an auxiliary tool for use in interpreting ambiguous statutory provisions.”

In the *Woolworth case*, *supra*, Judge L. Hand said:

“To suppose that Congress must particularly correct each mistaken construction under penalty of incorporating it into the fabric of the statute appears to us unwarranted; our fiscal legislation is detailed and specific enough already. While we are of course bound to weigh seriously such rulings, they are never conclusive;”

It is noteworthy that in the *Crane Case*, *Supra*, the court said (6):

“In the *first* place, the words of statutes—including revenue acts—should be interpreted where possible in their ordinary, everyday senses.” (Italics ours)

Appellee states that the principal question is whether the said Section of the Regulation properly construes Section 3469, I.R.C. (B. 10). The principal question, however, is whether or not the Appellants were operating their vehicles on an established line.

The Appellants contend that neither the Internal Revenue Code nor the Regulations define the meaning of the words “established line” as used in the statute, and that the meaning of those words must be determined before the term “operated on an established line” can have meaning. In promulgating Section 130.58 of Treasury Regulations 42 the Commissioner of Internal Revenue must have had a preconceived meaning of the

words "established line" as used in the statute, or the words he used in Section 130.58 of Treasury Regulations 42 in defining "operated on an established line" are without meaning. But as there is no indication in either the Statute or the Regulation of the meaning of the words "established line" we are forced to seek their true meaning in this action unfettered by administrative interpretation.

Appellee admits the words "established" means "permanent", "recurring" or "regular" (B. 11). In *Wells Lamont Corp. v. Bowles*, 149 F. 2d 364, 366 (Em. App.), cited by Appellee the words established was said to mean:

"To establish is to make stable or firm; to fix in permanence and regularity, to settle or secure on a firm basis, to settle firmly or to fix unalterably."

In *U. C. C. v. Collins*, 182 Va. 426; 29 S.E. 2d 388, 393, the court said:

"An 'established' business is one that is permanent, fixed, stable or lasting."

Appellee contends that where there is doubt as to the construction of a statute the interpretation of the law by the department enforcing it is held to be controlling where not arbitrary or unreasonable (B. 11). The point of law expressed here is not in issue since the Treasury Department has not placed an interpretation upon the meaning of the words "established line" as used in the statute.



There is no logic to the argument propounded on the bottom half of page 13 and the top half of page 14 of Appellee's brief. There is nothing to indicate that a Regulation promulgated in connection with a statute passed in 1918 and repealed in 1922 had such legislative approval that the only thing the Commissioner could do in 1942 was to promulgate without material change a definition of "established line" embodied in the earlier Regulation. As indicated no definition of "established line" is attempted in the latter Regulation.

Appellee states that "the regulatory provisions have remained substantially unchanged since 1918, and during that period, Congress repeatedly has reenacted the provisions of the revenue laws on which they are based" (B. 14). Prior to the above quote statement of fact Appellee stated that the transportation tax had been repealed in 1922 (B. 13). Clearly one of the statements of fact is incorrect. The fact is, Congress has not repeatedly reenacted the provisions of the revenue laws upon which the regulatory provisions are based.

**REPLY TO APPELLEE'S ARGUMENT HEADED:  
"B. THE EVIDENCE SUPPORTS THE DISTRICT  
COURT'S DETERMINATION THAT TAXPAY-  
ERS VEHICLES WERE OPERATED ON  
A ESTABLISHED LINE." (B. 15)**

To support its position Appellee states that the testimony showed the limousines were operated with "rea-



sonable" regularity (B. 15). The term "reasonable regularity" is completely foreign to both the statute and the regulation. Appellee has erred grossly in stating that "all operations were between definite points, Boeing Field Airport on the one hand, and the downtown area of Seattle on the other hand" (B. 15). Facts to the contrary are supported by uncontradicted evidence (T.R. 57, 69, 78). Appellee states that the only persons authorized to dispatch the limousines were taxpayers employees (B. 16). In and of itself this means nothing. The essential fact is that the limousines were ordered out for the purposes with which we are concerned only upon instructions or orders from the airlines (R. 97, 98, 116, 118, 120, 129). The airlines had the right to give such instructions (Ex. 1).

The conclusions drawn by Appellee in the paragraph on page 16 of his brief beginning with the word "Hence" are obviously not supported by the evidence as pointed out with particularity on page 17 through 25 of Appellants' brief.

**REPLY TO APPELLEE'S ARGUMENT HEADED:  
"THE DISTRICT COURT DID NOT COMMIT  
REVERSIBLE ERROR BY ADMITTING  
EXHIBIT A-1 INTO EVIDENCE." (B. 16)**

On pages 13 and 14 of the Appellants' brief it was shown that the admission of Exhibit A-1 was error, but Appellee contends that Appellants have not shown that

the admission of Exhibit A-1 was prejudicial. Appellee further contends that there was testimony which would corroborate the statements in the letter (B. 17) and the admission was not therefore prejudicial. A scrutiny of the testimony referred to indicates material differences in the statements made in Exhibit A-1 and the testimony cited by Appellee on page 17 of his brief.

The inferences to be drawn from the statements in the letter are clearly contrary to the true facts as brought out by admissible testimony and therefore the admission of Exhibit A-1 was reversible error (R. 61, 71, 81, 85, 93, 94, 96, 102, 103, 110, 111, 118, 120, 127, 128).

In the case of *McCandless v. United States*, (1936) 298 U.S. 342, 349, the court said:

“This, as the language plainly shows, does not change the well-settled rule that an *erroneous ruling* which relates to the substantial rights of a party is *ground for reversal unless it affirmatively appears from the whole record that it was not prejudicial.*” (Italics ours)

The case of *United States v. Crescent Amusement Co.*, 323 U.S. 173, cited by the Appellees (B. 17) follows the above rule of law for the court examined the whole record and found that other evidence was sufficient to establish the restraint of trade. Thus the record in that case affirmatively established that the admission of the evidence was not prejudicial. In the case at Bar the statements in Exhibit A-1 and the testimony cannot be harmonized with respect to the drivers being required to follow a specified route (R. 61, 93, 94, 102, 127, 130,

131). The whole record does not affirmatively show that the admission of Exhibit A-1 was not prejudicial and such admission is therefore reversible error.

**REPLY TO APPELLEE'S ARGUMENT HEADED:  
"ADDITIONAL FINDINGS OF FACT WERE  
NOT NECESSARY." (B. 18)**

We agree that the findings should state only ultimate facts and virtually said so on page 26 of Appellants' brief, but once having undertaken to go into detail it became the court's duty to make findings upon *all* the facts bearing upon the question of whether Appellants were "operating on an established line" rather than only upon some of them. The Appellee may also be right in his footnote at page 15 of his brief in saying, in effect, that the court's Conclusion of Law I appears to be more properly a finding than a conclusion. Appellants said substantially the same thing (R. 43-44, Appellants' Brief 26, 27), but whatever it is it is contrary to and not supported by the evidence.

Appellee contends that the trial court's findings of fact and conclusions of law furnish a clear understanding of the basis of the District Court's decision (B. 19). This hypothesis may be true but the conclusion does not follow that the decision of the trial court is correct. In the case of *United States v. Forness*, 125 F. 2d 928, 942 (C.C.A. 2), cited by the Appellant, the court said:

"We stress this matter because of the grave importance of fact finding. The correct finding, as near as may be, of the facts of a law suit is fully as important as the application of the correct legal rules to the facts found. An impeccably 'right' legal rule applied to the 'wrong' facts yields a decision which is as faulty as one which results from the application of the 'wrong' legal rule to the 'right' facts."

The trial court said its Conclusions of Law were based upon the facts found (Tr. 33). The whole record clearly indicates that many of the facts clearly established by the evidence bearing directly upon the question of whether the Appellants were operating on an established line were not found by the trial court. From the foregoing it is readily apparent that the omission is prejudicial error.

## **INACCURATE FACTUAL STATEMENTS**

There are some inaccurate statements of fact in Appellee's brief. For example Appellee says that it is undisputed that the primary contract between taxpayers and the passengers was for the transportation of passengers and not for hire or use of the vehicle, and he cites page 9 of the printed Transcript to support the statement (B. 16). An examination of page 9 of the Transcript shows the principal activity of Appellants in the field of local transportation has consisted of the transportation of persons, but that its agreements with the airlines was "to provide limousine service". Somewhat



akin to this, Appellee states the Appellants entered into an agreement with United Airlines to provide "transportation by limousine for United's passengers to and from Boeing Airport in Seattle", and cites page 26 of the Transcript in support (B. 3). Page 26 of the Transcript says the contract was to provide "transportation service" to and from said places. Appellants drove their limousines where and when they were directed by the airlines.

Appellee also states that the limousine drivers were instructed by taxpayers to follow the most direct route to the airport, and he cites page 28 and 29 of the Transcript in support (B. 5). Said pages of the Transcript do not state who gave such instructions, and we have found nothing further in the record with respect to who did. Appellee failed to point out that page 29 of the Transcript also says, the drivers "were free to and did select the streets over which they travelled, and they usually used Southwest Fourth Avenue or Airport Way when going to and from Boeing Field, as the trip over either street is of equal distance, but in cases of traffic congestion or when streets were undergoing repairs, the drivers themselves selected other streets upon which to travel." The record clearly shows the Appellants did not specify to the drivers what streets to use (R. 61, 93, 94, 102, 110, 127, 130, 131).



## CONCLUSION

Appellee has not shown that Appellants' definition of "established line" was erroneous, and Appellants in their brief have shown that they were not operating their limousines on an established line within the meaning of the statute. Therefore, the judgment of the trial court should be reversed.

Respectfully submitted,

R. T. JACOB,

RANDALL S. JONES,

917 Public Service Bldg.,

Portland 4, Oregon,

Attorneys for Appellants.



**In the United States**  
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**APPELLANTS' PETITION FOR REHEARING**

---

Upon Appeal from the District Court of the United  
States for the Western District of Washington,  
Southern Division.

---

R. T. JACOB,  
RANDALL S. JONES,  
917 Public Service Building,  
Portland 4, Oregon,  
*Attorneys for Appellants.*

FILED

JUN 28 1941

PAUL P. O'BRIEN



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Upon Appeal from the District Court of the United  
States for the Western District of Washington,  
Southern Division.

---

To the United States Circuit Court of Appeals for the  
Ninth Circuit and the Honorable Judges thereof:

Comes now the appellants in the above entitled cause  
and hereby respectfully petition this Honorable Court  
for a rehearing of the above entitled cause. The grounds  
upon which the appellants rely are as follows:

## I.

This Court overlooked the distinction between the power granted under the Federal Declaratory Judgments Act, 28 U.S.C.A., Sec. 400, and the Court's power apart from any statute to decide a question which might guide a public agency in its future acts.

## II.

This Court in a material way misapprehended the appellants' argument and the significance of the cases cited by the appellants on pages 4 and 5 of the Supplemental Brief of appellants; namely, the argument and cases showing that the case at bar is not moot.

## III.

This Court erred in holding in effect that the Federal Declaratory Judgments Act, 28 U.S.C.A., Sec. 400, precludes the court from determining whether or not at the times mentioned in the complaint and pre-trial order the appellants were operating their seven passenger motor vehicles on an established line within the meaning of Sec. 3469 of the Internal Revenue Code (26 U.S.C.A., Sec. 3469).

## IV.

This Court erroneously concluded that it was without power to decide the question stated in ground III above.

**STATEMENT OF FACTS AND  
POINTS OF LAW  
UPON THE ABOVE GROUNDS**

Appellants respectfully show:

In its opinion filed May 18, 1948, this Honorable Court stated that it was not "at liberty to grant the declaratory relief it has been suggested we ought to give," and cited 28 U.S.C.A., Sec. 400, as excluding from the power to grant such relief controversies with respect to federal taxes. The relief sought and referred to is a decision by Honorable Court upon the question of whether or not at the times above mentioned appellants were operating their seven passenger motor vehicles on an established line within the meaning of 26 U.S.C.A., Sec. 3469.

The Declaratory Judgments Act, 48 Statutes at Large, Ch. 512, p. 955, (28 U.S.C.A., Sec. 400) was approved June 14, 1934, and amended August 30, 1935, so as to except controversies with respect to Federal taxes. Wholly apart from this statute the Federal Courts have the power to grant the relief sought by the appellants. The cases of *Boise City Irrigation and Land Company v. Clark*, 131 Fed. 415 (C.C.A. 9, 1904) and *So. Pac. Terminal Co. v. Int. Comm. Comm.*, 219 U.S. 498, 515 (1911), cited at pages 4 and 5 of appellants' Supplemental Brief herein, were decided many years prior to the enactment of the Declaratory Judgments Act. In the *Boise City* case this Court indicated and exercised its power to decide a question of law presented which

might serve to guide a public agency in the future. This power did not and does not rest upon a statute. This power would enable the Court to determine a question of fact as well as law where the determination comes within the reason and purpose for which the power exists. It is this power existing wholly independently of any statute that appellants respectfully requested and again request this Court to exercise in the case at bar.

*Walling v. Mutual Wholesale Food & Supply Co.*, 141 F. (2) 331 (C.C.A. 8, 1944), also cited at page 5 of the Supplemental Brief, was decided after the enactment of the Declaratory Judgments Act, but the power that the Court exercised in this case did not rest upon the Act nor upon any other statute.

The Declaratory Judgments Act is purely a grant of power. The Act was not designed nor intended to displace nor abrogate previously existing rules, powers and remedies. As the function of the amendment was merely to restrict the use of the newly granted power to controversies other than those with respect to Federal taxes, the amendment likewise did not displace powers of the Federal Courts which existed prior to and independent of the original Act.

The appellants did not institute a proceeding under the Declaratory Judgments Act, and they are not bound by its restrictions. They brought their action for a refund of money collected from them as taxes.

This Honorable Court has held appellants are not



entitled to a refund, but that holding does not make this a case instituted under 28 U.S.C.A. 400. The appellants relied and still rely on the power of the Court which exists wholly apart from any statute to decide the question above stated.

The holding that the appellants are not entitled to a refund does not make moot the question of whether or not plaintiffs were operating on an established line within the meaning of Sec. 3469, I.R.C. The whole matter simmers down to whether that question is moot in this case, and the authorities hereinbefore cited show that it is not. The Declaratory Judgments Act is not involved.

Decision on the question is necessary as a future guide to Bureau officials as well as to the appellants. This Court has the power to decide that question irrespective of 28 U.S.C.A., Sec. 400 as amended, but it gave no consideration to this power. It did not mention this power in its opinion, and, as stated, it was this power upon which appellants relied, and not upon the grant of power under 28 U.S.C.A. 400. If the Court should consider that the exercise of this power is discretionary, then appellants request the Court to exercise it in this case because an adjudication of this point at this time will resolve the instant dispute and obviate the need for, and expense of repetitious litigation in the future concerning the latter quarter of 1944 and following years. The record on the question of whether or not appellants were operating their vehicles on an established line is complete and it is before this Court.

(C.C.A. 3, 1944), cited in the opinion, there was no contention that the facts and circumstances required a ruling for future guidance. The nature of the transaction was not recurrent as it necessarily is in the instant case. The *Sharp & Dohme* case does not hold that this Court in a case such as the one at bar cannot properly pass upon a question such as we are requiring it to decide.

WHEREFORE, Upon the foregoing grounds, it is respectfully prayed that this petition for a rehearing be granted, that this Honorable Court exercise its power to determine and that it determine the question of whether or not at and during the times mentioned in plaintiffs' complaint and the pre-trial order the appellants were operating their vehicles on an established line within the meaning of 26 U.S.C.A., Sec. 3469, and that the decision of the District Court upon that question be reversed.

Respectfully submitted,

R. T. JACOB,

RANDALL S. JONES,

917 Public Service Building,

Portland 4, Oregon,

Attorneys for Appellants.

I hereby certify that in my judgment, as counsel herein, the foregoing petition is well founded in law and it is not interposed for the purposes of delay.

RANDALL S. JONES,

Of Counsel for Appellants-Petitioners.

## APPENDIX

As originally enacted the first paragraph of the Declaratory Judgments Act, 48 Statutes at Large, Ch. 512, p. 955 (28 U.S.C.A., Sec. 400) approved June 15, 1934, read as follows:

“In cases of actual controversy the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.”

Section 405, Ch. 829 of 49 Statutes at Large, p. 1027 approved August 30, 1935, amended the above paragraph of the Declaratory Judgments Act as follows:

“by adding after the words ‘actual controversy’ the following: ‘(except with respect to Federal taxes)’.”

26 U.S.C.A., Sec. 3469(a), imposing the transportation tax concludes with the following sentence:

“Such tax shall apply to transportation by motor vehicles having a passenger seating capacity of less than ten adult passengers, including the driver, only when such vehicle is operated on an established line.”











